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Robert A. Sedler
Wayne State University

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LAW REFORM IN THE EMERGING NATIONS OF SUB-SAHARAN AFRICA: SOCIAL CHANGE AND THE DEVELOPMENT OF THE MODERN LEGAL SYSTEM

ROBERT ALLEN SEDLER*

INTRODUCTION

Most discussions of law reform revolve around changes in the law of a "developed" legal system. By the term, "developed legal system," we mean one that has a well-defined body of law and established institutions administering that law. The changes brought about by law reform will take place within that framework, and when such a system is examined in perspective, it is clear that law reform has been an ongoing process. The Anglo-American system as we know it—the content of its law and the nature of its legal institutions—has been the product of gradual and evolutionary growth.¹ The development of the system has paralleled the development of the nation as a whole. As new societal institutions are created, new needs appear, and the law develops in response to those needs. Likewise societal values change, and as they do, there are changes in the legal system to reflect the new values.² For example, it is now recognized that, on the whole, the law of negligence was developed with a view toward meeting the problems of industrial activity and mechanization and was designed to limit the liability of new enterprises.³ As those enterprises became more secure and the risks of capital investment were somewhat reduced, different pressures were put on the legal system, and in response to them a law relating to industrial accidents emerged, of which Workmen's Compensation, for example, is a part. Values had changed, and there was greater concern for the victim of industrialization and renewed emphasis on the apportionment of loss resulting from industrial

* A.B., J.D., University of Pittsburgh; Professor of Law, University of Kentucky College of Law. The author was Assistant Dean and Associate Professor of Law at Haile Sellassie I University, Addis Ababa, Ethiopia, from 1963-1966.

1. Dean Pound has traced this growth from the stage of primitive law, to strict law, to equity, and finally to the stage of maturity. POUND, *JURISPRUDENCE* 367-456 (1959).

2. For a discussion of the relationship between public opinion and new law see FRIEDMANN, *LAW IN A CHANGING SOCIETY* 10-12 (1959). See generally DICEY, *LAW AND PUBLIC OPINION IN ENGLAND* (2d ed., 1963).

3. The concern with limiting liability is demonstrated by judicial opinions such as those in *Winterbottom v. Wright*, [1842] 10 M. & W. 109, 152 Eng. Rep. 402, and *Blyth v. Birmingham Waterworks*, [1856] 11 Excheq. 781, 156 Eng. Rep. 1047. And see the view that "the price of progress cannot be withheld," expressed in *Beatty v. Central Iowa Ry.*, 58 Iowa 242, 12 N.W. 332 (1882).

activity.⁴ The present trend to strict liability for harm caused by product use is a further illustration of legal change in response to changing needs and values.⁵ The law reform that has taken place has been *evolutionary* and has been within the framework of an established legal system. An entirely different type of law reform must take place in the emerging nations of sub-Saharan Africa.⁶ This type of law reform is *revolutionary* in nature and will occur in the context of the development of a modern legal system.

At present the emerging nations of sub-Saharan Africa have undertaken a process of planned societal and economic development. They are trying to transform and modernize their societies and economies as rapidly as possible so that they may enjoy "all the good things which western civilization has produced in the two millennia of its history."⁷ These nations are in the throes of the "revolution of rising expectations."⁸ A desire for "equality" in this sense is a motivating force making for social and economic change,⁹ and the concept of modernization—perhaps a legacy of western colonialism¹⁰—is seen as the means of reaching that goal. Thus, there will be planned economic development, and it is assumed without question that the government has the responsibility to see that it takes place.¹¹ A major effort is being undertaken to completely modernize the subsistence economy under which the majority of Africans live,¹² with its deleterious economic, social and psychological effects.¹³ The government is investing heavily in the public sector of the economy—roads, hospitals, schools, electrical systems, dams and so forth are being built as rapidly as revenues and external assistance will permit.¹⁴ Efforts also are being made to obtain foreign capital invest-

4. The theory of Workmen's Compensation is said to be that "the cost of the product should bear the blood of the workman." Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 401 (1912).

5. See the discussion in PROSSER, *TORTS* 672-74 (3rd ed., 1964).

6. The term sub-Saharan is designed to exclude the Arabic nations of North Africa and the United Arab Republic. Some African states are predominantly Moslem, and in those states an additional dimension is presented in regard to the reform of Islamic law. In the present paper we will be discussing reform of Islamic law only tangentially. On that subject see generally ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* (1959).

7. SPIRO, *POLITICS IN AFRICA: PROSPECTS SOUTH OF THE SAHARA* 6 (1963).

8. "Africans demand better education, better health standards, better roads, water and electricity; better houses, more and better food and clothing, automobiles and bicycles, radios and television. And they demand them now. In short, Africans demand development." Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 WIS. L. REV. 999, 1018.

9. WARD, *THE RICH NATIONS AND THE POOR NATIONS* 14-15 (1962).

10. "The great world-wide transmitter of modernizing tendency has been without doubt—for good and evil—Western colonialism." *Id.* at 51.

11. See the discussion in KAMARCK, *THE ECONOMICS OF AFRICAN DEVELOPMENT* 16-17 (1967). See also Harvey, *The Challenge of the Rule of Law*, 59 MICH. L. REV. 603, 612 (1961).

12. KAMARCK, *supra* note 11, at 33.

13. *Id.* at 34. This will be discussed in greater detail, *infra*.

14. In most African nations current government expenditures usually run

ment on an extensive scale.¹⁵ It is this economic development and modernization which is the focal concern of the emerging nations of sub-Saharan Africa.

A necessary concomitant of planned economic development and modernization is radical social change. The change from a subsistence to a money economy has profound social implications for the family structure, which has revolved around the subsistence economy.¹⁶ So too, education and exposure to new ideas call into question familial and tribal loyalties. Significant migration from rural to urban areas also occurs, and many nations are becoming increasingly urbanized.¹⁷ Patterns of behavior are altered as a result of new opportunities that have become available. The modernization process itself increases tensions, produces frustration and in general creates psychological and social problems.¹⁸ The peoples' way of life is being transformed, and so is the nature of the society itself.

As part of this planned development the legal system must be reformed so as to be one that is suitable for the new society which is being established. The legal system that exists was necessarily designed to meet the needs of the existing society,¹⁹ and it is clear that it will be inadequate to meet the needs of the new one.²⁰ In its present state it is not capable of providing the solutions for the new kinds of legal, social and economic problems that must be faced. The existing legal system may also be "underdeveloped" in the sense that a well-defined body of law applicable to all persons is lacking and that the institutions administering the law and the boundaries of power between them have not been clearly defined. The fundamental question of what the law will be and what institutions will administer

between 15-20% of gross national expenditures. When the operations of utilities, ports and the like, which are generally government-owned, are included, along with the investment in the whole public sector, the total approaches one-third. *Id.* at 35.

15. And, of course, external assistance from foreign governments, international organizations, foundations, and so forth.

16. This will be discussed in greater detail, *infra*.

17. In many of the leading cities growth is taking place at a rate in excess of the absorptive capacity. HANCE, *AFRICAN ECONOMIC DEVELOPMENT* 5 (1967).

18. See the discussion and review of studies in Milner, *M'Naghten and the Witch Doctor: Psychiatry and Crime in Africa*, 114 U. PA. L. REV. 1134, 1139-40 (1967).

19. And insofar as the country was formerly under colonial rule, particularly the needs of the colonial power. See generally the discussion in Seidman, *supra* note 8, at 1005-15.

20. If for no other reason than the fact that the received law was developed with a view toward the objectives of the colonial power and that African law was not permitted to evolve naturally. See the discussion of the latter point in ALLOTT, *ESSAYS IN AFRICAN LAW* 56 (1960). More importantly, revolutionary change is being planned, which necessarily betokens the establishment of a new legal system to reflect such change. It was for this reason that completely new legal systems were established in Turkey following the Ataturk revolution and in Japan following the Meiji Restoration. See the discussion in Sedler, *The Development of Legal Systems: The Ethiopian Experience*, 53 IOWA L. REV. 562, 566-67 (1967).

it remain to be definitively determined. It is the fact that these questions are unanswered that marks the difference between a developed and what we may call a developing legal system.²¹

More significantly, there is no time for the law to evolve gradually in response to societal needs as they appear at a given time. The weaknesses in the existing system are all too apparent, and a new legal system must be established as a part of the process of planned development. It is in this context that the matter of law reform in the emerging nations of sub-Saharan Africa must be considered. Law reform will take place as a part of the establishment of a modern legal system, designed to meet the needs of a society going through revolutionary and planned development.

This legal system must take account of the social change that has been occurring as a result of planned development and modernization. Moreover, if it is to be enduring, it must have the necessary flexibility to anticipate and adapt to the further changes in values and ways of living that will occur as the process continues. In this sense the legal system must *accommodate* itself to existing and anticipated social change. Therefore, one dimension of law reform that we will consider is the accommodation of law to ongoing social change as a part of the establishment of a modern legal system.

Another dimension of law reform, particularly important in developing countries, involves the role of law in engineering social change. The issue is whether the law itself may be employed to bring about the changes in behavior patterns and ways of living that are considered necessary for the development of the new and modern society. We are familiar with the use of law to deal with particular social and economic problems as they appear. A labor relations law will change the relative power of workers and management, thereby attempting to solve the problems created by the inequality of bargaining power. Zoning laws will change the way in which property is used.²² But on the whole, we have not attempted to employ the legal process to change the very way in which people live their lives and to lead them into completely new patterns of behavior. Our law of the family, for example, reflects our societal values concerning stable family life. Monogamous marriage historically was a religious and social command, and this institution forms the basis of our law of marriage and divorce. The law did not attempt to impose this type of marriage on a people whose values

21. As the term, "developed legal system," is used in this context, it is clear that a number of "developing nations" have "developed legal systems." Many nations of Latin America, the Middle East and Asia can be said to be "developing" in the economic sense, but their legal systems are as "developed" as those of the economically advanced countries. India or Brazil would furnish a good example. In these countries law reform will also take place, but it will be in the context of the reform of a developed legal system.

22. See the discussion in FRIEDMANN, *supra* note 2, at 4-5.

and beliefs dictated plural marriage. Our economic system developed with little interference from the legal order; and, only after a basic structure was established, did the law attempt to *regulate* economic activity. But even then no radical innovation occurred, such as changing the method of land ownership and use²³ or converting subsistence agriculture into market agriculture. In retrospect, it is clear that our economic and social patterns of behavior evolved with little impetus from the legal order and that the law accommodated itself to existing patterns. Changes in law generally came only after changes in behavior patterns, or at least after changes in values, which then called for new behavior patterns.²⁴ We have seen the law develop in response to social change, and we have also seen the law employed to deal with particular social problems. However, we have not seen the law employed as an instrument to bring about radical social reordering, to the point of completely transforming the economic and social structure of the society. And to the extent that the application of the law threatens to bring about such a reordering great resistance is encountered.²⁵

Evolutionary changes in response to changed values and the pressures of public opinion may be said, then, to represent the conception of law reform in the developed nations of the world. It is, therefore, important that we understand that law reform may have an entirely different connotation in the nations which are in the process of rapid social and economic development, for here the law may be viewed as an instrument of social control in its broadest sense. A primary function of law may be to engineer the social and economic change necessary to achieve the goals of development. If these nations are to enter the modern world and to attain the benefits that modern civilization can offer, the nature of the existing society must be significantly altered. The question is whether this can be done through the processes of the law. We have long recognized that law is a device for social ordering,²⁶ but in the emerging nations of sub-Saharan Africa the question is whether law can be used to completely alter a peoples' way of life.

23. Our basic body of property law, in fact, developed in response to the requirements of the feudal system. This explains why a law of property came into being before other branches of private law. POTTER, *AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS* 30-31 (Kiralffy ed., 1958).

24. We must always remember that there may be a difference between the real values held by the people and officially approved values. Patterns of behavior are more likely to follow the real values except to the extent that official approval or disapproval itself may influence behavior patterns.

25. The prohibiting of government-required segregation following the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, would be considered only a step toward changing the pattern of Negro-white relationships in the South. And yet it has met with unprecedented resistance.

26. One of the "law jobs" is preventive channeling and the reorientation of conduct and expectations. LLEWELLYN & HOEBEL, *THE CHEYENNE WAY* 294-97 (1941). See also the discussion in HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 344 (1966).

If law is to be used for this purpose, it must necessarily run counter to the values reflected in the existing way of life. This is contrary to our conception of law as deriving its value content from the values of the people to whom it applies. But, as Professor Harvey has pointed out, "[i]t is possible for law to draw its value content from the acceptances of an elite group that has succeeded in monopolizing the function of manipulating the technique and is using it to achieve social change."²⁷ *This is the situation that prevails in the emerging nations of sub-Saharan Africa.* The values of modernization and economic progress of which we have been speaking are the values of an elite that is in control of the development of these countries. Nowhere else is the distinction so marked between a small governing elite and the great mass of the population. This has nothing to do with the form of government in a particular country—it is as true in a monarchy like Ethiopia as it is in a relatively democratic government like Kenya. It stems from the conditions of African life, in which the great mass of people remained tied to the subsistence economy and traditional living while a small number, through education and exposure to the modern world, have acquired entirely different values.²⁸ Upon independence the educated elite succeeded to the political control formerly exercised by the colonial power.²⁹ It is they who have made the decision for development and modernization; and in order to achieve this objective, they must impose their values, at least in part, on the bulk of the population, a population which is largely illiterate, living on a subsistence level and following the traditional way of life.

They may seek to impose these values through the processes of law and to employ the law as a means of *accelerating* social change in order that the goal of development and modernization may be achieved. The second dimension of law reform that we will consider then is the use of law as a means of accelerating social change in the developing society. As part of that consideration we will also focus on law reform as it relates directly to economic development.

27. *Id.* at 346.

28. "In all African countries there are two distinct societies to an extent unknown in Europe or North America, and a rule that is appropriate to the one will probably be totally inappropriate to the other." GOWER, *INDEPENDENT AFRICA* 3-4 (1967).

29. In countries such as Ethiopia and Liberia, which had not been brought under colonial rule, the educated elite exercises control in this sense because those who hold the reins of government have made a decision for modernization. But in Ethiopia particularly, the power of the educated elite is counterbalanced by the influence of traditional political leaders, who may or may not be in sympathy with the values of modernization.

THE DEVELOPMENT OF THE MODERN LEGAL SYSTEM AND THE
ACCOMMODATION OF LAW TO SOCIAL CHANGE

A. *The Pluralistic Legal Order*

All but two of the emerging nations of sub-Saharan Africa have only recently achieved independence.³⁰ As a result of their colonial past they "inherited" a legal system. That system was pluralistic in nature, with the laws and legal institutions consisting of those which had been "received" from the colonial power and those which were "indigenous" to the African state. The legal system at the time when an African nation became independent has been described as follows:

The colonial power introduced its own metropolitan law, or a variant of it, into its newly acquired African territory. The general or territorial legal system thus created usually applied throughout the territory and to all its inhabitants; but there were very substantial exceptions, at least in the British territories, in favor of the indigenous populations, who, by the relevant legislation, remained largely subjected to their own local and customary laws. This was especially true in those areas of life where the most direct conflict would otherwise arise between imported and indigenous law, for example, in the law of the family, of marriage and divorce, the law of property and succession, and the law of civil and criminal wrongs. Nor was this all: the British also recognized, and made official instruments of their colonial rule, the indigenous tribunals which administered justice to the African populations. The institution or recognition of a native court system in parallel with the system of territorial or western-law courts obviously did an enormous amount to build in and maintain the dualism of laws.³¹

Thus, just as the American colonies "received" the "Law of England," so was it "received" in the British colonies of sub-Saharan Africa.³² This received law included the common law, principles of equity and statutes of general application.³³ The nature and extent of the reception in Africa is a subject of great debate and has given rise to a number of problems, a discussion of most of which is beyond the scope of this writing.³⁴ It was this law which formed the "general"

30. See note 29, *supra*. This exception must be borne in mind, since we will continually be making reference to the law received from the colonial power. I have described the development of Ethiopia's legal system elsewhere. See note 20, *supra*. Liberia voluntarily adopted the common law as its main body of law and has always maintained a separate system of customary law for the non-assimilated indigenous population. See ALLOTT, *supra* note 20, at 11-12.

31. Allott, *Toward the Unification of Laws in Africa*, 14 INT'L & COMP. L.Q. 366, 370 (1965).

32. For a discussion of how this law was received, see ALLOTT, *supra* note 20, at 3-10. A somewhat different method of reception took place in the Sudan. See Guttman, *The Reception of the Common Law in the Sudan*, 6 INT'L & COMP. L.Q. 401 (1957). In a few of the ceded colonies and protectorates, some other general body of law was received, such as Roman-Dutch law in Basutoland.

33. This was the "common form phrase" denoting the received English law.

34. See generally ALLOTT, *supra* note 20, at 3-10; DANIELS, *THE COMMON LAND IN WEST AFRICA* 109-48 (1964); PARK, *THE SOURCES OF NIGERIAN LAW* 14-42 (1963).

law of the system, along with the penal codes and similar legislation which were later promulgated for the colonies, and legislation enacted by the colonial legislatures. In the French colonies, French Codes were imposed and provided a *droit commun* throughout French West Africa and French Equatorial Africa.³⁵ In the other African colonies, the law of the colonial power was also imposed.³⁶

An equally important component of the legal system was customary law. In every society norms of conduct have grown up, some of which are obligatory, and therefore, may be said to have the force of law—hence the concept of customary law.³⁷ It was this law that provided the needed social control in the traditional African society. Professor Allott has described customary law in the following way.³⁸ It is unwritten, and the rules can be traced to the customs and practices of the people which have been handed down to succeeding generations. The law consists of different bodies of rules that may be invoked in different contexts. These rules are based on conceptions of morality and depend for their effectiveness on the approval and consent of the people. The law has evolved in response to the pressures put upon the people by their way of life and their adjustment to life in the particular community. Professor Allott also contends that all unwritten customary laws, African or otherwise, resemble each other more than any single customary system resembles any written system.³⁹ Moreover, customary law cannot be separated from the traditional method of dispute resolution. This involved conciliation and compromise as well as adjudication. The law was more of a guide to the resolution of disputes than a series of binding norms, and the judgment in a given case found its support in the consensus of the community.⁴⁰ It was the method of dispute resolution which gave effect to the norms of the customary law, and we shall have more to say about this subsequently.

Customary law was extremely important in the British colonies

35. See Farnsworth, *Law Reform in a Developing Country: A New Code of Obligations for Senegal*, 8 J. AFR. L. 6, 7 (1964). For a general discussion of the legal systems of the French colonies during the colonial period, see Pageard, *La réforme des juridictions coutumières et musulmanes dan les nouveaux états de l'Ouest africain*, 1963 RECUEIL PENANT 462, 463-66.

36. See Crabb, *The Environment and Nature of the Legal System of Congo-Kinshasa*, 1966 WIS. L. REV. 1125, 1139-42.

37. See the discussion of the distinction between obligatory and nonobligatory norms in NWABUEZE, *MACHINERY OF JUSTICE IN NIGERIA* 3 (1963). As Hoebel put it, "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting." HOEBEL, *THE LAW OF PRIMITIVE MAN* 28 (1954). See also ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 60-75 (1956).

38. The discussion that follows is taken from ALLOTT, *supra* note 20, at 55-68.

39. *Id.* at 63. See also PROCEEDINGS OF THE AFRICAN CONFERENCE ON LOCAL COURTS AND CUSTOMARY LAW 20-24 (1960).

40. ALLOTT, *supra* note 20, at 68. See generally ELIAS, *supra* note 37, ch. 12.

and was a key element in the policy of "indirect rule." This policy required that the customs and traditions of the African population should be interfered with as little as possible and that authority should be exercised through the traditional rulers.⁴¹ As a result, most disputes between Africans were generally governed by customary law and were heard in the customary or "Native" courts.⁴² However, ultimate control was retained by the colonial government in a number of ways. The relationship between what may be called "English" law and customary law was horizontal in the sense that the boundaries of each were defined and substantial areas of activity were assigned to customary law.⁴³ But it was also vertical or hierarchical in the sense that the English law and government courts were the "superior" part of the system.⁴⁴ In every pluralistic system there is an irreducible minimum of hierarchical ordering, if for no other reason than that the respective spheres of application between the two bodies of law must be defined. Even within the areas assigned to customary law, certain cases might be governed by English law,⁴⁵ and customary law was not to be applied where it was "repugnant to natural justice, equity and good conscience"⁴⁶ or "incompatible either directly or by necessary implication with any legislation for the time being in force." Determinations of repugnancy or incompatibility were to be made by the government courts, staffed primarily by English judges.⁴⁷ Nonetheless, notwithstanding its being subject to the control of the colonial power, customary law was a very important part of the legal system and furnished the grounds for decision in most disputes between Africans.

Customary law was also applied in the French colonies, but it was of much less significance because of the French policy of direct rule. The French sought to destroy the power of the indigenous rulers⁴⁸ and to create a sense of French rather than African identity. The goal was to establish an indigenous elite who achieved legal rights by conforming to French cultural (and of course linguistic) patterns.⁴⁹ The legal system carefully distinguished between the *evolué* and the native. French nationals and *evolués* were governed in all respects by the received French law. Non-assimilated natives

41. GOWER, *supra* note 28, at 6-8.

42. See generally ALLOTT, *supra* note 20, ch. 7.

43. For a discussion of horizontal and vertical ordering in a pluralistic legal system, see HARVEY, *supra* note 26, at 240-41.

44. *Id.* at 243-45.

45. Such as where the case involved a transaction between a native and a non-native, or where the transaction did not "lend itself to the application of customary law so that the parties must presumably have intended to be bound by English law."

46. This concept is analyzed in Caplan, *The Making of "Natural Justice in British Africa."* *An Exercise in Comparative Law*, 13 J. PUB. L. 120 (1964).

47. HARVEY, *supra* note 26, at 244. For a discussion of this "stranger in a foreign land," see Caplan, *supra*, note 46 at 129-32.

48. GOWER, *supra* note 28, at 8-9.

49. Farnsworth, *supra* note 35, at 15.

were governed by customary law in matters of family law, property and succession, but were still subject to French law in other matters. There were also customary courts with jurisdiction in cases governed by customary law and limited jurisdiction in cases governed by French civil and commercial law.⁵⁰ Customary law never achieved the same importance in French Africa as in the British colonies, and it had declined in importance there even before independence.⁵¹ For this reason the pluralistic nature of the legal order and its effect on the modern legal system can best be considered with reference to the former British colonies.⁵²

The achieving of independence may be said to constitute a revolutionary change in the nature of the existing society. The educated African elite—in one political form or another—now have the reins of power and intend to use that power to lead the nation into rapid economic development and modernization. As part of this process of revolutionary change attention must be given to reform of the existing legal system, for that system was established in a colonial context to meet the objectives of the colonial power. The system must be reformed so that it will be suitable for an independent nation embarking upon planned economic development and modernization.

The fact that the legal system will be reformed to meet these new objectives does not necessarily mean that the *structure* of the present system will be abolished. Indeed, the opposite has almost universally been true. Upon achieving independence, fundamental changes must be made in the political system in order to transfer the power from the colonial rulers to the leaders of the independent nation, but the almost invariable practice has been for a new state to retain the structure of the legal system that existed prior to independence. On July 5, 1776, the political system in the former American colonies had been altered, but the basic legal system that was in effect on July 3rd remained in effect on July 5th and has continued in the same form up to the present day. The primary source of law in the American states was and is still the common law that was originally "received" from England, and we speak of the "common law system." This was true of other countries that were former British colonies such as Canada (except Quebec), Australia, India, Singapore and so forth. Whereas, in North American states like Quebec and Louisiana that were under French rule, codes form the primary source of law, and these states are said to have the "civil law system." So too, upon attaining independence the African

50. Paegard, *supra* note 35, at 463-64.

51. Farnsworth, *supra* note 35, at 14.

52. In the French colonies customary law is clearly on the way out, and it is likely that in the future a series of codes of universal application will be enacted. See the discussion of post-independence development in the former French colonies in Sedler, *supra* note 20, at 593-94.

states have retained with little change the structure of the legal system that was "inherited" from the colonial rulers.⁵³

This is understandable and, on the whole, desirable. The persons who will be directing the development of the legal system, and who will be responsible for its reform, have received their training in whatever law made up the essential elements of the existing system. Legal concepts and ideas based on that system have emerged, and the present body of law and legal institutions can serve as the starting point for further development. More importantly, all that necessarily has been retained is the *structure* of the existing system. The crucial issue confronting the independent nation is the extent to which the *substance* of the legal system will be changed to meet the needs of the nation after independence, needs which relate to economic development and modernization. In other words, the fact that the structure of the existing legal system has been retained does not in and of itself have anything to do with law reform. It is what is *done* to that system, to the substance of the law and legal institutions, that is significant. Upon the structure of the existing system a substantively new and different legal system must be established, and its establishment must take place with reference to the needs and values of the particular nation and the ongoing social change resulting from development and modernization.

When this proposition is applied to the emerging nations of sub-Saharan Africa, it is complicated by two factors. In theory the received law was to be applicable "only insofar as local circumstances permitted," so that the received law should already have been "reformed" to comport with African needs, at least as they appeared when the question of incorporation first arose. Secondly, the inherited legal order was a pluralistic one, and there had been a great deal of interaction between the received law and customary law. A fundamental question concerns the place of customary law in the new legal system and whether the pluralistic order is to continue.

With respect to the first factor, while some adaptation may have taken place during the colonial period,⁵⁴ the sad truth is that for the most part English law as administered in Africa differed very little from the law administered in England. The received law was applied without regard to its suitability for local conditions, and as far as statute law was concerned, was increasingly obsolete.⁵⁵ The received law of property, for example, embodied the essential capital-

53. See the discussion and examples in Sedler, *supra* note 20, at 572-75.

54. Mostly in the context of whether an English statute was to be "received." One writer is of the opinion that in Nigeria, for example, "only rarely is an English Act both of general application in England and not prevented by local circumstances from operating in Nigeria." PARK, *supra* note 34, at 35. He estimates that only between 30 and 40 English statutes were received. See also Guttman, *supra* note 32, at 411.

55. GOWER, *supra* note 28, at 29.

istic notion that ownership could be separated from labor, which ran counter to the position of customary law, where the right to enjoy the benefits of property depended upon occupation and cultivation.⁵⁶ The British legislation of the late nineteenth and twentieth centuries, which imposed restrictions on the use of property and provided protection for labor, were never introduced in Africa as "statutes of general application."⁵⁷ Legislation enacted by colonial legislatures tended to be carbon copies of British statutes,⁵⁸ so that both with respect to received statutes and legislation enacted by the colonial legislatures, the focal point was the social and economic conditions prevailing in England rather than Africa.⁵⁹ And the inherited common law was truly the "law of England" as pronounced by the English courts. Not only will the received law have to be reformed to take account of the social change that has occurred in these societies, but it will also have to be reformed to take account of African social and economic conditions to begin with.⁶⁰

With respect to the interaction between received law and customary law, a different picture is presented. Customary law, by its very nature, is developed in response to the needs and conditions of a particular people, and as they change, customary law should change with them. But customary law operating in the purely social context of the life of a people is something much different from customary law as part of a pluralistic and formalized legal system. We have earlier observed that customary law was more of a guide to the resolution of disputes than a series of binding norms. Once it was incorporated into the legal system and "operated upon" so as to bring it more in line with British ideas of "law," it could no longer retain that character. Professor Twining has graphically described the transformation of customary law:

With the introduction of a local courts system set up and supervised by the colonial rulers there were radical departures from indigenous patterns. To a large extent efforts were made to use existing institutions, but it was easier to do this with peoples who had developed governmental institutions than with people who had minimal government, just as it was easier to control and influence the settled agriculturalists than the wandering pastoralists. To everybody the local courts system presented at least some unfamiliar features and to some people the whole idea was totally and incomprehensibly alien. Judicial bodies with defined jurisdiction and fixed personnel

56. Seidman, *supra* note 8, at 1007.

57. *Id.* at 1008.

58. GOWER, *supra* note 28, at 27-28.

59. It does not appear that general legislation was drafted by the British Parliament with reference to its effect on the colonies. For an illuminating example of this, see the discussion in KASUNMU AND SALACUSE, *NIGERIAN FAMILY LAW* 12 (1966).

60. See the very interesting discussion in Mustafa, *The Treatment of Exemption Clauses by the Sudan Courts*, 11 J. AFR. L. 119 (1967). Rules based on the assumption that a party should read a transportation ticket have been uncritically applied in the Sudan where over 80% of the population is illiterate.

were superimposed on less clearly defined institutions and often the geographical area of jurisdiction cut across tribal and even ethnic boundaries. The personnel of the courts were by no means elders according to native law and custom and in a number of places Government-appointed chiefs, owing greater allegiance to Government than to tribe exercised judicial powers. Moreover the functions that those bodies were required to perform were not identical with those of the indigenous institutions that were being built on. Most significant of all, perhaps, was the creation of a ladder of appeals and revisions with expatriates stationed at the top of the ladder, and the provisions, in some instances, enabling the same expatriates to participate in proceedings at all levels. It was this general overlordship of the local courts by European administrators that provided the most important channel for the infusion of alien ideas into the administration of justice at the lower levels and at the same time it acted as a unifying influence. Local court holders came to know what was expected of them and some of them may sometimes have imitated what they had seen when acting as witnesses or assessors in the superior courts.⁶¹

As a result customary law became a system of law binding persons subject to its jurisdiction, but in the process lost its essential character. We must continually bear in mind that "native law and custom," as applied in the official courts today is significantly different from the pre-European "customary law."⁶²

Even within this framework, significant changes in the content of customary law have also taken place. In the traditional society a norm of customary law was determined by its popular acceptance, following the anthropological definition of a legal norm.⁶³ This was no longer so when customary law came to be applied by officially recognized "courts," whose decisions were subject to the review by the higher courts, which were administering a different kind of law. This hierarchial aspect of ordering may mean, as one writer has contended, that a rule of customary law could not "legally exist" until discovered through judicial inquiry.⁶⁴ More importantly, the courts were empowered to reject a rule of customary law on various grounds, and a number of rules of customary law were invalidated in this way. This being so, has not the source of substantive customary law itself changed? While such law initially may spring from the "consensus of the people," its validity and effect in the legal system depends upon judicial acceptance, and whether a rule will be recognized cannot be known until the matter has come before a superior court. Therefore, it has been concluded that:

... the term "customary law" today would mean these rules of traditional customs which are discoverable by judicial inquiry and which are enforceable because they are acceptable as conforming

61. TWINING, *THE PLACE OF CUSTOMARY LAW IN THE NATIONAL LEGAL SYSTEMS OF EAST AFRICA* 9-10 (1964).

62. *Id.* at 4.

63. See the discussion of norm-acceptance in HOEBEL, *supra* note 37, at 14-17.

64. Ogwurkie, *The Source and Authority of African Customary Law*, 3 U. GHANA L.J. 11, 15 (1966).

to what ought to be the current values in society. If it is the assent of the native community that gives a custom its validity, the mere existence of a customary rule will be enough to give it validity. But the attitude of the judiciary which picks and chooses between an enforceable customary rule and the non-enforceable ones seems to have shifted the emphasis from the consensus of the community to the opinion of a handful of judges. Can it therefore be rightly said that customary law as a source of law today is law *par excellence* in the sense that it is the *volksgeist* of the people? Has the judicial attitude not given it a character which is analogous to case-law and in some ways statute-law? Law must have validity, and it is the source of validity of law that classifies it as statute law, case-law or customary law.⁶⁵

It is difficult to dispute this conclusion, at least insofar as it demonstrates that the nature of customary law in the legal system is something much different from its nature in the traditional society.

Thus far, we have not spoken about changes in customary law that have occurred in response to changes in patterns of behavior produced by the advent of colonialism and the exposure to modern civilization. Such changes have occurred as well. In some parts of Africa customary law has come to recognize the significance of a writing in connection with land transfers.⁶⁶ With increased mobility, family ties have been loosened, and the extent of vicarious liability for the wrongs of family members may be narrowing.⁶⁷ And it has been recently demonstrated that in Ghana,⁶⁸ as a result of changing economic conditions, an individual interest, very much like a freehold, has been recognized with respect to family or "stool land."⁶⁹ All of this points out that the normal evolution of customary law in response to changing conditions is likewise a factor to be considered.

There is a need then to define the place of the two bodies of law, received and customary, in the new legal system. Is the pluralistic order to be retained, or is a merger to take place? More importantly, how is the substance of the law to be altered to accommodate the social change which has taken place and which may be expected to take place as a result of the process of planned development?

B. *The Modern Legal System: Unification and Adaptation*

It may be assumed that the content of the customary law has changed in response to the changing conditions of life. This being so, a strong argument exists for its retention as part of a pluralistic legal order. Customary law meets the needs of the people, and the imposition of an entire body of alien rules upon people still living an essentially traditional way of life could cause social upheaval.⁷⁰

65. *Id.* at 17-18.

66. See ALLOTT, *supra* note 20, ch. 10.

67. ELIAS, *supra* note 37, at 282-83.

68. This matter will be discussed in greater detail, *infra*.

69. Asante, *Interests in Land in the Customary Law of Ghana—A New Appraisal*, 74 YALE L.J. 848 (1965).

70. See ELIAS, *THE NIGERIAN LEGAL SYSTEM* 377 (1963).

Particularly if the received law has not been adapted to local conditions, there is little utility in compounding the problem further by imposing it upon the bulk of the people who are not yet "ready" for it. There are further advantages to having separate local courts administering the law. The proceedings are inexpensive and expeditious; and despite the changes brought about by formalizing customary litigation, there still will be some emphasis on conciliation, and the proceedings are more likely to be acceptable to the people.⁷¹ Where local courts exist, they generally handle a large number of cases, and their abolition would place a heavy burden upon the regular courts.⁷²

However, if customary law is retained as a separate part of the legal system, this means that the law will be different law for different peoples. *For there is no such thing as uniform customary law.* A particular body of customary law operates in a relatively small area; there may be substantial variation in the law of adjoining geographical areas and even within a single tribal unit.⁷³ We cannot accurately speak of the customary law of Ghana or of Kenya, but only of the law of a particular tribe or sub-group.⁷⁴ If the pluralistic legal order is to be retained, problems in the "internal conflict of laws" will be frequent, that is, what customary law is to be applied to cases involving persons subject to different systems of customary law.⁷⁵ This is intensified by increasing migration and contact between members of different tribal groups. More importantly, the existence of different law for different persons impedes the development of national unity.⁷⁶ Tribalism has been a serious problem in most African states. Colonial boundaries did not follow tribal lines. A number of tribes live within a particular state, and some tribes will be found on both sides of national boundaries.⁷⁷ Many of these tribes have been traditionally hostile, and the leaders of the nation must overcome this hostility in order to develop a national consciousness.⁷⁸ Separate systems of law based on tribal or geographical

71. See the discussion in PROCEEDINGS, *supra* note 39, at 14-15.

72. ELIAS, *supra* note 70, at 377.

73. See Roberts-Wray, *The Need for Study of Native Law*, 1 J. AFR. L. 82 (1957). However, it may be, as we shall see subsequently, that in a number of areas the application of different customary laws often will not produce a different result.

74. The number of such groups may be quite extensive. See TWINING, *supra* note 61, at 21.

75. See the discussion in ALLOTT, *supra* note 20, at 154-55. But cf. TWINING, *supra* note 61, at 24-25.

76. See Roberts-Wray, *supra* note 73, at 86; Cowen, *African Legal Studies—A Survey of the Field and the Role of the United States*, 27 LAW & CONTEMP. PROB. 545, 552 (1962).

77. If customary law is employed in both countries, these tribes will then have the same law, which may tend to cause them to identify more with each other than with their own national unit.

78. Practically all African leaders agree that existing boundaries cannot be changed—to do so would require remaking the map of Africa. See CHARTER OF THE ORGANIZATION OF AFRICAN UNITY, art. III. In extreme form tribal-

grouping can adversely affect this effort and impede the development of the needed national consciousness. The modern legal system of a nation must be national in scope,⁷⁹ and the applicability of law should not depend on ethnic criteria, particularly where there is a need to develop a national consciousness.

It is important to distinguish between the applicability of *different customary laws* to different people and the applicability of *some kind of indigenously-based law* (as opposed to the received law) to people still living the traditional way of life. The matter of a separate system of customary law is really part of a broader question and is only one answer to it. That question is the extent to which new and unfamiliar law is to be imposed upon a people. The imposition of such law can only be justified if the law is deliberately designed to change the peoples' way of life, that is, if the law is to be employed to accelerate social change. But to the extent that the law is to reflect existing values and needs, an indigenous law, having as its source the consensus of the people, is obviously more suitable than a received law, particularly if that received law has not been adapted to local conditions.

It is not unfair to say that most of the African states have not fully come to grips with this problem. Almost universally, they have chosen to retain customary law as a separate part of the legal system, but at the same time they have limited its operation and effect.⁸⁰ Ghana is a good example. Customary law is to be applied by all courts where it is applicable, and there are also local courts having limited jurisdiction in cases governed by customary law. The circumstances of applicability are specifically defined, and they are limited. The initial presumption favors the application of the common law, and the burden is on the person seeking the applicability of customary law to prove this.⁸¹ The theory is that all persons are subject to the common law, but that when a person shows that as a member of a particular locality he is entitled to the benefit of a local custom in accordance with the law, he will be given the benefit of that custom.⁸² Professor Harvey has pointed out that customary law must be viewed in the larger perspective of the relations between the traditional tribal institutions and the power centers of the new national state, and that in the new order the center of activity in the creation and adaptation of norms will be the national legislature.⁸³ He

ism can result in genocide and attempted succession, as witnessed by the recent events in Nigeria.

79. Or, at least uniform within federated parts of a national state.

80. Ethiopia is the most conspicuous exception, which we will discuss subsequently. Guinea is also said to have abolished customary law as a separate part of the legal system. See Pageard, *supra* note 35, at 479.

81. See the discussion in HARVEY, *supra* note 26, at 259-63.

82. Ollennu, *The Influence of English Law on West Africa*, 5 J. AFR. L. 21, 34 (1961).

83. HARVEY, *supra* note 26, at 266-67.

has also observed that since the adoption of a republican form of government in Ghana, that part of the legal order derived from indigenous sources has suffered continued attrition in favor of legal norms received from non-indigenous (English) sources and incorporated in a rapidly growing body of national legislation.⁸⁴ In the French colonies, for the most part, customary law retains the limited applicability it had during colonial times, but the trend in some countries is toward the enactment of codes of uniform application and the abolition of customary law.⁸⁵

The crucial issue of law reform, however, cannot be dealt with in the context of whether the pluralistic legal order is to be retained. The real problem is not one of determining the extent to which customary law or received law should apply, but of determining the extent to which law itself, on the one hand, should accommodate itself to the social change that has taken place, and on the other hand, should be employed as a means of accelerating social change. The matter of a unified or pluralistic legal system does not address itself to that fundamental question, and, in a sense, is irrelevant to it.

Rational legal planning, then, will not find its expression in the solution to the question of whether separate regimes of customary and received law are to be maintained as a part of the new legal system. Rather the goal must be to establish a system in which the law will reflect the social change that has taken place and at the same time make provision for the acceleration of social change where this is deemed necessary and feasible. In this connection, there is an important distinction to be drawn between what may be called "the general body of law," designed to serve as a basis for conflict resolution and problem adjustment and the "law of social engineering," which is designed to control and alter patterns of behavior in order to achieve societal objectives.⁸⁶ A certain amount of overlapping of function will necessarily occur, and the two bodies of law must be complementary. For example, the law relating to land tenure might provide for individual ownership in an attempt to change patterns of land utilization. At the same time the norms of that law will be used to resolve conflicts over who is entitled to cultivate a given piece of land. And conflict resolution is related to social engineering, in that a purpose of conflict resolution is to insure the social stability a society needs if it is to achieve economic progress. Nonetheless, this distinction can be drawn in terms of primary function. Subsequently, we will discuss the "law of social engineering," that is, how the law can be employed to accelerate social change and promote economic development. The present discussion will focus on the establishment

84. *Id.* at 269-70.

85. See the discussion in Sedler, *supra* note 20, at 593-94.

86. See the discussion of the "law jobs" in LLEWELLYN & HOEBEL, *supra* note 26, at 290-93.

of a body of "general law," which will be suitable for conflict resolution and the adjustment of the problems of day-to-day living that a society faces. It is in this context that we will deal with the accommodation of law to social change.

As pointed out previously, the new legal system is likely to be built upon the structure of the old, so that one question to be answered is how the general body of law will relate to the existing received and customary law. The methodology of the common law and of customary law are similar in that both systems lend themselves to the accommodation of ongoing social change. For this reason it is possible to view both the received law and the customary law as providing the sources for the norms of the new system. The resulting body of law will reflect present needs and values; and since it will possess the methodology common to both the received and customary law, it can have the necessary flexibility for accommodation. However, it must be emphasized that this body of law is designed primarily to serve the function of conflict resolution and problem adjustment. The areas of activity where behavior patterns may have to be changed in order to accelerate social change and to attain the objectives of economic development must be identified and must be dealt with by a separate body of law designed primarily to serve the function of social engineering.

This distinction has very significant implications with regard to the role of customary law as providing norms for the general body of law in the new system. For when we identify those areas of activity and behavior which may have to be changed if modernization and economic development are to take place, *we see that these are precisely the areas where customary law has been most important and where, under the present ordering, it is to be applied.* It is agreed that customary law has not been very important with respect to contractual obligations and commercial activity.⁸⁷ Since customary law developed in response to the needs of people living in the traditional society, it would follow that a law relating to contractual obligations and commercial activity would be of little importance, as their needs in those areas were minimal. As will be pointed out, customary criminal law was completely eliminated during the colonial period, and there is no question of its being reintroduced.⁸⁸ The real significance of customary law lies in the areas relating to the life of the people in the traditional society, namely family relations, land tenure and succession to family property.⁸⁹ It is these areas where

87. See PROCEEDINGS, *supra* note 39, at 22; ELIAS, BRITISH COLONIAL LAW 273 (1962). In African societies, as in less developed societies generally, rights depend upon "status rather than contract."

88. See PROCEEDINGS, *supra* note 39, at 22.

89. There is general agreement on this point. See PROCEEDINGS, *supra* note 39, at 23; Roberts-Wray, *supra* note 73, at 84-85; ELIAS, *supra* note 87, at 274.

behavior patterns may have to be changed if economic progress and modernization are to take place. To allow customary law to operate in these areas will merely reinforce the existing behavior patterns; and, to the extent that change is desired, these areas must be removed from its domain. Nor should it be thought that the problems will be solved in any realistic way by the application of the received law which was developed to deal with English not African conditions. The problems must be dealt with directly by a body of law designed for that purpose.

Once it is realized that the most significant areas in which customary law has been allowed to operate are the very areas that will have to be dealt with directly, the most compelling argument in favor of the pluralistic legal order—that customary law meets the needs of the people living in the traditional society—disappears. If these areas are to be taken out of the domain of customary law as such—and, as we will see, this does not mean that norms of customary law and consideration of the traditional behavior patterns and values will not be relevant in determining the content of the law to be applied—the importance of customary law as a source for the general body of law is appreciably lessened. And the disadvantages of having different law for different people, with its adverse effect on efforts to achieve national unity, are clear. It should be possible to establish a uniform law applicable to dispute resolution and problem adjustment. This would mean the end of the pluralistic legal order, with its separate regimes of received and customary law.

What is needed, then, is the unification of the received law and the various customary laws into a body of modern law to perform the functions of dispute resolution and problem adjustment for a society in the process of development. Professor Allott has postulated three stages in the unification of the laws of a particular country.⁹⁰ First there is harmonization, which is defined as:

the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law.

The next stage is integration, defined as:

the making of a new legal system by combining the separate legal systems into a self-consistent whole. The legal systems thus combined may still retain a life of their own as sources of rules, but they cease to be self-sufficient autonomous systems.

Finally, there is unification, which is:

the creation of a new, uniform, legal system entirely replacing the pre-existing legal systems, which no longer exist, either as self-sufficient systems, or as bodies of rules incorporated in the larger whole; although the unified law may well draw its rules from any of the component legal systems which it has replaced.

90. Allott, *Toward the Unification of Laws in Africa*, 14 INT'L & COMP. L.Q. 366, 376-77 (1965).

During the colonial period in Africa, harmonization had been pretty well achieved. But the move toward integration and unification of laws "has been a consequence of independence, of the desire to build a nation, to guide the different communities with their different laws to a common destiny."⁹¹ It is this movement which should result in a uniform system of law, reflecting national needs and objectives.

Although the plural legal order still exists in most of the emerging nations of sub-Saharan African, the trend is clearly in the direction of integration and unification. A certain amount of integration of customary laws takes place by national evolution. With increased urbanization and contact between people of different tribal groups, changes in customary practice occur, and this may be reflected in the customary law of the various groups.⁹² There is evidence that a kind of urban customary law is developing in some places.⁹³ In addition, affirmative efforts have been taken toward the establishment of integrated customary law.⁹⁴ The most comprehensive effort has been that of Tanzania. The aim is to produce a unified version of customary law for the whole country by a series of declarations in codified form covering all the main fields (except land law) in which customary law is important. Draft declarations of customary laws are submitted to a panel of experts and then to district councils. The hope is that these declarations will be applicable in as many areas of the country as possible. When the approval of the district council has been obtained, a government notice is published declaring the unified law as stated in the declaration to be the customary law in the particular area. This method allows for change in existing law and for new provisions that previously were not contained in any of the separate customary laws.⁹⁵ Ghana has established a mechanism for the assimilation of customary law rules into the common law, and a "common law rule of customary law origin" has priority of application over rules derived from either the common law or any system of customary law.⁹⁶

While these efforts may some day lead to the unification of laws into a single legal system, it will be a long, drawn-out process. The present situation in most countries still is that of a pluralistic legal order consisting of received law (which for the most part has not

91. *Id.* at 378.

92. See COTRAN, *THE PLACE AND FUTURE OF CUSTOMARY LAW IN AFRICA*, IN *EAST AFRICAN LAW TODAY* 72, 91 (1966).

93. Allott, *supra* note 90, at 385.

94. Apart from action by the various governments, there has also been the work on the Restatement of African Law Project, sponsored by the School of Oriental and African studies of the University of London.

95. See the discussion in COTRAN, *supra* note 92, at 82-85; GOWER, *INDEPENDENT AFRICA* 92 (1966). See also the discussion of the work in Kenya in COTRAN, *supra* note 92, at 80-81; TWINING, *THE PLACE OF CUSTOMARY LAW IN NATIONAL LEGAL SYSTEMS OF EAST AFRICA* 38-41 (1964).

96. The process is described in HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 252-53 (1966).

been adapted to local conditions), a certain amount of local legislation (often based on English statutes), and diverse customary laws. What is surprising is that while comprehensive efforts have been made to transform the economy and modernize the country, the same intensity of directed planning has not gone into the development of a new and modern legal system. Perhaps this is the fault of lawyers and judges who have not realized the potentiality of law as an instrument of social change and the need of law to accommodate itself to such change. Somehow it is almost as if they see law as removed from the developmental process. The law—particularly the received English law in which they have been trained—"is there," and it is separate from whatever else is going on in the country. If this attitude continues, the lawyer may become an irrelevant figure in the new society.⁹⁷ As Professor Gower has put it:

In other words I am not very proud of the legal legacy which we have bequeathed to our colonies. But it must be admitted that this view would not be shared by most of the trained lawyers in those countries whose belief in the perfection of English law surpasses that of any Englishman, and who seem able to ignore most of the complications flowing from the duality of English and customary laws.⁹⁸

The lawyer in these countries must not only be competent to administer and operate the law as it is now, but must be willing and equipped to reform it.⁹⁹

If a unified legal system, combining the best features of the received law and the diverse customary laws is to be established, it is clear that this will have to be done by legislation. The judicial process—with its creation of norms on a case by case basis—does not contain the mechanism for effecting a revolutionary and comprehensive change. Even if the courts were disposed toward assimilating the different customary laws and the received law into a body of law adapted to the needs of the particular country—which it appears they are not¹⁰⁰—they could not do so in any organized and systematic way, let alone within any reasonable period of time. The new legal system must be established according to a definite plan, and this is best accomplished by legislation.

In this process it is possible to make the necessary adaptations of the received law and to incorporate the best rules of the various

97. His function would be limited to that of representing private clients in litigation. This appears to be the situation in Ghana, where lawyers as such do not play a prominent role in public life. HARVEY, *supra* note 96, at 193-95. As to the need for the lawyer to play a role in development see generally Friedman, *Role of Law and the Functions of the Lawyer in Developing Countries*, 17 VAND. L. REV. 181 (1963).

98. GOWER, *supra* note 95, at 30.

99. *Id.* at 102.

100. The tendency rather is to "Anglicize customary law rather than to Africanize English law." *Id.* at 94. See the sharp criticism of the Sudanese judges in Mustafa, *The Treatment of Exemption Clauses by the Sudan Courts*, 11 J. AFR. L. 119, 135-36 (1967).

systems of customary law. The legislation would take the form of a "common law code" like that of California, or the Uniform Commercial Code. It would build on the received common law and would be interpreted according to common law principles. In other words, the common law system would be retained as the structure of a new legal order, which would reflect the unification of received customary law.

In this connection, some guidance may be obtained from the adoption of comprehensive codes in Ethiopia. I have described this process in detail elsewhere¹⁰¹ and will only discuss it by way of illustration here. Since Ethiopia had not "received" any law from a colonial power and desired to develop a comprehensive body of modern law as soon as possible, it was decided to use civilian-type codes as the basis of the system. It was also decided that there would be no separate system of customary law. While Ethiopia never had a separate system of customary law in the sense that it existed in the colonial states,¹⁰² the complete abolition of customary law was still a rather revolutionary step for an emerging African nation to take.¹⁰³ It should also be pointed out that many of the provisions of the Ethiopian codes were deliberately designed to change behavior patterns so that the codes do not only represent the law to be employed for conflict resolution and problem adjustment but also the law that was intended to accelerate the needed social change. Nonetheless, the Ethiopian codes can serve to illustrate how a unified legal system is established. From the standpoint of technique, the following observations may be made. The codes were drafted by foreign experts¹⁰⁴ and then submitted to a codification commission composed of distinguished Ethiopians representing law, government and business. Most of the work was done by a smaller body consisting of leading jurists and officials from the Ministry of Justice. A number of changes were made by this body. Finally, the codes were debated in Parliament, and some additional changes were made.¹⁰⁵ The entire process demonstrates concern for adaptation to the present and anticipated needs of the country.

In this process careful attention was paid to the traditional way of life and the effect that the new law would have on this. As pointed out previously, a number of provisions were designed to alter behavior patterns and to accelerate social change. In certain situations, the inability of the law to serve the latter function and to change behavior patterns overnight was recognized, and traditional practices

101. Sedler, *supra* note 20.

102. See the discussion in Sedler, *supra* note 20, at 595-96.

103. See the discussion in Allott, *supra* note 90, at 378.

104. Cf. Allott, *supra* note 90, at 388; GOWER, *supra* note 95, at 94-95.

105. See the discussion of some of the changes that were made in Sedler, *supra* note 20, at 582-83.

continued to be sanctioned. So too, customary law and practice was considered as a possible source for the new law, and some provisions were based on that law.¹⁰⁶ There were certain references to customary law which for the most part either concerned matters of form or matters to which references to custom are made in other legal systems.¹⁰⁷ In only one area—adverse possession to land—could substantive rights be affected by customary law.¹⁰⁸ The final result was a uniform body of law, intended to be suitable for the new society in the process of development.¹⁰⁹

The same kind of law reform can be undertaken in the rest of Africa, and it appears to be taking place in a number of French African countries such as Senegal.¹¹⁰ To the extent that efforts have been made to record and codify customary law, that law can more effectively be considered as a source. The received common law and English statutes can be evaluated against the needs and problems of the particular country and truly “applied insofar as local circumstances permit.” The end product will be an amalgam of common law, legislative, and customary norms within a unified legal system.

As pointed out previously, the most significant areas of customary law were those relating to the family, land tenure, succession and the like, around which life in the traditional society revolved. To the extent that law is to be employed as a means of accelerating social change, it is primarily those areas which will be affected. Resistance to change and the limitations upon law as a means of social control may best be considered in that context. Such resistance is not as likely to be encountered with respect to the new body of law of which we have been speaking thus far, precisely because it does not involve those sensitive areas. If it is carefully adapted to the needs of the country and reflects the social change that is taking place, it may meet with even greater acceptance than the present system, with its received law based on English needs and values, and its different

106. This is discussed in detail in Krzczunowicz, *A New Legislative Approach to Customary Law: The “Repeals” Provision of the Ethiopian Civil Code of 1960*, 1 J. ETHIOPIAN STUDIES 57 (1963); *The Ethiopian Civil Code: Its Usefulness, Relation to Custom and Applicability*, 7 J. AFR. L. 172 (1963).

107. See the discussion and list of examples in Krzczunowicz, *supra* note 106, at 60.

108. Sedler, *supra* note 20, at 599.

109. There were special problems as regards separate law in family and property matters for Ethiopia's large Moslem population. The present “solutions” are discussed in Sedler, *supra* note 20, at 602-05. As to the problems resulting from the application of the new codes see Sedler, *Id.* at 605-09. For a general discussion of the problems faced by the drafter of the Civil Code and of the theory of reform see David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187 (1963). See also Graven, *The Penal Code of the Empire of Ethiopia*, 1 J. ETHIOPIAN L. 267 (1964); Vanderlinden, *Civil and Common Law Influences on the Developing Law of Ethiopia*, 16 BUFF. L. REV. 250 (1966).

110. See Farnsworth, *Law Reform in a Developing Country: A New Code of Obligations for Senegal*, 8 J. AFR. L. 6 (1964).

regimes of customary law.

C. *Dispute Settlement: Reform and Return*

The abolition of customary law as a separate part of the legal system will obviate the need for separate customary courts. However, the abolition of customary law and customary courts as such provides the opportunity for another kind of law reform. This reform would in a sense be a "throwback" to the traditional society and would perpetuate what I think to be one of its great strengths. Likewise, it would ease the adjustment to the new legal system. The proposition for which I now am contending is that in the process of law reform African countries should preserve the advantages of traditional customary adjudication and dispute resolution, *which were lost when customary law was incorporated as a separate part of the legal system and customary courts were set up to replace the administration of justice by tribal leaders*. In traditional litigation the emphasis was on compromise and conciliation. The "law" was but a guide to the resolution of disputes. The process was clearly one oriented toward conflict resolution, and the final decision not only had to be acceptable to the litigants, but was to reflect the consensus of the community.

The customary judicial process has been examined in depth by anthropologists for some time.¹¹¹ One of the most recent studies¹¹² involves the Arusha, an agricultural tribe in Northern Tanzania, among whom dispute settlement is said to be a "social process." In this connection, an important distinction is drawn between "law" as representing binding norms,¹¹³ and the real basis for resolution of a dispute. As the author observes:

Whilst it would be incorrect to say that an agreed settlement of a dispute never wholly conforms with the relevant, socially accepted norms, it is true to say that such precise conformity is the exception. Before I began to understand the general principles of the Arusha dispute process—but often having already recorded some of the norms from informants—I was frequently puzzled by the gap between the details of an agreed settlement and the declared norms. The norms themselves were invariably quoted during the dispute discussions, and this confused me further. I noted that the Arusha themselves were not worried by this gap; indeed they seldom commented on it, although it was sometimes large. After beginning to appreciate Arusha concentration on compromise, which would provide a mutually acceptable resolution of a dispute, I was almost inclined to describe them as cynical opportunists. If by that is meant "unprincipled," it is a wrong description of the Arusha in these matters. . . . They are, then, guided by their principles of

111. Some of the "classical" anthropological studies of African tribes are SCHAPER, *A HANDBOOK OF TSWANA LAW AND CUSTOM* (1938); GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (2d ed., 1967); BOHANNON, *JUSTICE AND JUDGMENT AMONG THE TIV* (1957).

112. GULLIVER, *SOCIAL CONTROL IN AN AFRICAN SOCIETY* (1963).

113. See note 37, *supra*.

right behavior, and they use them as the bases of claims to rights; but they accept an imperfect world in which an individual does not and should not expect to gain all the ideal rights prescribed by the approved norms. But equally, men hope to be able to avoid some of the obligations implicit in those norms. It is perhaps significant that the Arusha have no word that can be translated as "justice," nor does any such concept appear in their ideology. It is an irrelevant consideration. They are prepared to agree to something which is as near to their claim as possible in the particular context of the strengths and weaknesses of the two parties to the negotiations. Further, they believe that undue insistence on one's "rights" under these norms may well conflict with obtaining an effective settlement, and with establishing or maintaining otherwise satisfactory relations. . . .¹¹⁴

The Arusha are suspicious of the official "native" courts, considering them to be alien-imposed institutions.¹¹⁵ While the "political" nature of the process¹¹⁶ might be troublesome to us, it cannot be doubted that the process is effective in arriving at a mutually satisfactory solution.

In some societies the traditional authorities function more like "judges," but here too the emphasis is on conciliation and reconciliation. This is reflected in the judgment, which unlike a jury's general verdict, for example, is not an all or nothing proposition. Rather, as one commentator has observed:

The judgments take the form of apportioning blame and praise for particular acts or omissions of the litigants as they unfold their stories and buttress them by witnesses or other evidence. It is the one who, on balance, has more points against him that finally gets mulcted in fine or compensation for the benefit of the other.¹¹⁷ Restoration of the parties to the *status quo ante* is the keynote of the judicial process, and nothing must be left in the possession of one which legitimately belongs to the other. Even where the final point is scored by only one party so that fine or compensation is imposed on the other, the latter goes away at least satisfied by the open-handed way in which the various aspects of the respective rights and wrongs have been acknowledged and appraised in the course of the judgment(s). The verdict, where it goes against him, does not strike him as the command of an all-powerful judge laying down an inexorable law which he hardly understands, or which can hardly be regarded as the expression of the common consciousness of the community.¹¹⁸

One writer has asked, "in what ways can the best of African values and techniques to be found in traditional ways of settling disputes be preserved and incorporated into the official legal system,"¹¹⁹ and this question may profitably be considered by legal planners in Africa today.

114. GULLIVER, *supra* note 112, at 241-42.

115. *Id.* at 268-74.

116. *Id.* at 299.

117. This is very nicely illustrated in a case that Kroeber recorded among another primitive people, the Yurok Indians in Northern California. See HOEBEL, *LAW OF PRIMITIVE MAN* 54-55 (1954).

118. ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 270-72 (1956).

119. TWINING, *supra* note 95, at 14.

Even in the most developed legal systems the techniques of conciliation and arbitration have occasioned new interest. In the United States, for example, a growing number of commercial cases are being referred to arbitration, and arbitration has been the method for resolving disputes under collective bargaining agreements for some time. Of course, what we are talking about here is not arbitration in this "legal" sense,¹²⁰ but it also illustrates an alternative to the adjudicatory and adversary method of dispute resolution, and one that has worked very well in the traditional African society. It may be asked whether the people living in the traditional society are hostile to new law as such, or whether their resistance is directed toward the alien legal institutions which have been imposed upon them. Notwithstanding the establishment of "native courts," many disputes are still settled by the traditional authorities.¹²¹ If the customary courts and a separate system of customary law are to be eliminated, recourse to the traditional authorities might be expected to increase.

It is possible to incorporate the traditional process of dispute settlement into the modern legal system in a number of ways. To the extent that the disputants have submitted their case to the traditional authorities and a judgment has been rendered, this should be recognized as a legally binding arbitration and prevent further litigation of the dispute in the courts.¹²² There may be objections to this approach on the ground that it would enhance the power of the traditional authorities at a time when the central government is trying to break their power,¹²³ but it may be asked whether it is not desirable to give them this kind of "judicial power," and whether they may not perform a useful function in this regard. Secondly, if customary courts are to be abolished, some kind of small claims court may be necessary in order to handle minor disputes. The judges of these courts—who may or may not be legally qualified—could be directed to attempt conciliation in the traditional way and to adjudicate the dispute only if this fails.¹²⁴ These courts would be seen primarily as places for conciliation and would be recognized to have a different function from the regular courts. Finally, there is no reason why formal provisions for conciliation could not be incorporated into the judicial process. This is done in Japan, which also has a long tradition of arbitration and conciliation.¹²⁵

120. See the discussion of the meaning of "arbitration" in ELIAS, *supra* note 118, at 212-15.

121. As Gulliver's research among the Arusha indicates. The same situation prevails in Ethiopia, and I would imagine in most other places as well.

122. It apparently has this effect in Ethiopia. See the discussion in Sedler, *supra* note 20, at 608.

123. See HARVEY, *supra* note 96, at 121-22.

124. It may be assumed that their decision could be appealed to a higher court with trial de novo.

125. See generally KAWASHIMA, *LAW IN JAPAN*, 41 (Von Mehren, ed., 1963).

The traditional process of dispute settlement, with its emphasis on conciliation and reconciliation, should be regarded as an important part of the African legal heritage. It was not incorporated into the legal system by the colonial powers, but, nonetheless, survived as a part of the "living law" of the people. As a part of the process of law reform and the establishment of the modern legal system, this indigenous institution may be given new life.

With regard to the accommodation of law to social change, then, the end product of law reform in these nations should be a modern legal system, unified in nature, and suitable for conflict resolution and problem adjustment in the new society.

LAW REFORM AND THE ORDERING OF BEHAVIOR: LAW AND THE
ACCELERATION OF SOCIAL CHANGE

A. *The Ordering Function of Law*

One of the recurrent themes of the history of legal thought has been the controversy over whether law should follow or lead, whether it should be a determining agent in the creation of new norms.¹²⁶ There is no doubt that law *has* been employed to change patterns of behavior in both democratic and autocratic societies; the difference between the two may relate primarily to how the decision to effect social change is made, or, at the most, to the degree of change that is attempted.¹²⁷ However, as we have pointed out previously, law has rarely been employed to effect a complete transformation of the peoples' way of life.¹²⁸ The result of political revolution has generally been a change in power relationships between competing groups and in the distribution of wealth between different economic classes. But a different kind of revolution is taking place in Africa today, the revolution of development. The stated goals of the ruling elite are to establish a modern society and economy, and this necessarily involves a radical change in behavior patterns if the goals are to be reached. It is the change from a "traditional" way of life to a "modern" one—with all that these words connote—that is contemplated. For this reason, the concept of law as a "determining agent in the creation of new norms" takes on a significance that it has never had before. It has been pointed out that the law's response to social needs and changing trends of public opinion is greatly stimulated by national emergencies.¹²⁹ So much of our present law of economic regulation,

126. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 3 (1959).

127. *Id.* at 9-10.

128. The adoption of the new legal system in Turkey following the Ataturk revolution might be considered an example of such an attempt. With respect to the Soviet Union, Friedmann concludes that "after more than forty years of Soviet law, despite many basic differences between the Soviet and other legal systems, no basically new concepts or legal relationships have developed." *Id.* at 9.

129. *Id.* at 12-13.

for example, can be traced to the emergency of the great depression. How much more so is this true in Africa today, where there is what may be described as a "continuing emergency," the need to establish a modern society and economy as soon as possible. This "emergency" may give rise to the need for law to create new norms and change patterns of behavior in order to serve as an instrument for the acceleration of social change. It is this function of law and its application to present-day Africa which we shall now consider.

The function of law as a method for social ordering cannot be separated from the values upon which this social ordering is to be based. Law itself is a value-neutral technique, and the values in aid of which the technique may be employed are as variable as human experience.¹³⁰ It has been pointed out that law is superorganic in that it is not predetermined in specific content by the inherent forms of the human organism.¹³¹ The "law" consists of a specially demarked set of social norms that are maintained through the application of "legal sanctions."¹³² Every social system rests upon certain "social postulates" which must be isolated from the law since the law is the technique for enforcing the norms following from those postulates.¹³³ We may call these postulates "values" and the enforceable, *i.e.*, sanctioned, norms "law." The content of the law, then, will be determined by the values of which it is an implementing technique.

What is the source of these values? In a democratic society it is assumed that the values which the law implements are those of the majority of the people, or at least of a cohesive minority that has been able to obtain the acceptance of its values by the majority.¹³⁴ It is in this sense that we speak of societal values. However, a democratic and *developed* society, as we know it, assumes theoretical equality between all persons and groups. *This assumption is simply not valid in the emerging nations of sub-Saharan Africa today.* There is a small elite which controls the reins of political power and which is oriented toward the values of modernization and economic development. The great mass of the people are illiterate, exist at a subsistence level, and are oriented toward the values of the traditional way of life. In such a case, it is possible, as Professor Harvey has demonstrated, "for the law to draw its value content from the acceptances of an elite group that has succeeded in monopolizing the function of manipulating the technique and is using it to achieve social change."¹³⁵ This is the situation which prevails in these na-

130. HARVEY, *supra* note 96, at 344-45.

131. HOEBEL, *supra* note 117, at 9.

132. Sanction seems indispensable to a definition of law. HOEBEL, *supra* note 117, at 28; HARVEY, *supra* note 96, at 344. See also HALL, *COMPARATIVE LAW AND SOCIAL THEORY* 56-57 (1963).

133. See the discussion in HOEBEL, *supra* note 117, at 13-17.

134. See the discussion in FRIEDMANN, *supra* note 126, at 10-11.

135. HARVEY, *supra* note 96, at 346.

tions. Admittedly there are serious implications for the concept of liberty as we understand it,¹³⁶ and it can be cogently argued that it is "undemocratic" for the elite to impose its values on the majority of the people before the people are "ready" for such change. A discussion of this question, however fundamental, is beyond the scope of the present writing. It must be accepted as "given" that the values which will be implemented by law are those of the governing elite, whose values are those relating to modernization and economic development. Our purpose here is to analyze the method by which these values can be reflected in legal norms designed to alter patterns of behavior based on traditional values, thereby accelerating social change. It should be noted, however, that the value assumptions on which the new law will be based involve a change from the values (and interests) of a foreign elite, i.e., the colonial power, to those of an indigenous elite who (it can be assumed) wish to change the society for the betterment of all the people.¹³⁷

The question of the extent to which law may be used to order behavior arises most clearly in the areas of criminal and family law, since the criminal law involves the proscription of individual behavior considered to be "anti-social" and family law involves the regulation of interpersonal relations. It is interesting to contrast the treatment of these two areas of law during the colonial period. The first type of English law systematically introduced in most African territories was the criminal law, which covered all serious crimes, although customary courts had jurisdiction to apply the customary law to minor offenses. This enabled the colonial authorities to control the "monopoly of force" and to define the nature of "anti-social" conduct.¹³⁸ Family relations, on the other hand, were largely the domain of customary law, since the maintenance of the traditional family system was in no way inconsistent with the colonial objectives. Indeed, it may have satisfied those objectives very nicely, since it kept the family subject to the control of the traditional authorities through whom the British were administering their policy of indirect rule. For the independent nation, of course, both areas will be very important, and needless to say, the objectives of the independent nation will be quite different from those of the colonial power.

136. See the discussion of the conflict between "liberty and security" as applied to contemporary Africa in Cowen, *supra* note 76, at 563-64. The same considerations are applicable to the conflict between "liberty and progress."

137. This is not to say that they may not benefit as well. Nonetheless, they are now "relatively privileged," and these privileges could be jeopardized by modernization.

138. See the discussions in TWINING, *supra* note 95, at 14; Seidman, *Law and Economic Development in Independent, English-Speaking Sub-Saharan Africa*, 1966 WIS. L. REV. 999, 1010-12.

B. *The Criminal Law*

There is no doubt that the structure of modern criminal law will follow the existing model and that a criminal code of universal application will govern, except possibly for very minor offenses.¹³⁹ The independent government is no less desirous of retaining the monopoly of force and defining the nature of anti-social conduct than was its colonial predecessor. The significant questions concern the content of that law, how it will be adapted to African conditions, and most importantly, how it will be used as a technique for social ordering. The importance of criminal law in any society is obvious, since it must provide the minimal security and order necessary for the society to operate. Such security and order are particularly necessary in Africa if development and modernization are to proceed.¹⁴⁰ Moreover, as we will see, the matter of establishing an effective body of criminal law in Africa is much more complex than elsewhere.

Since the criminal law represented most starkly the imposition of force by the colonial power, it is not surprising that a criminal conviction in a government court did not carry with it any social stigma. Professor Gower has described this situation very well:

Colonialism, like enemy occupation, tends to instill a contempt for the law and for the moral standards which it expresses. The government is an alien one; to cheat it is a patriotic duty. The law is that of the colonial oppressor; it has no moral sanction and punishment for breaking it has no normal or social stigma. The political future of a nationalist in Ghana depended upon acquiring the degree of P.G. (Prison Graduate), and one leader who failed to achieve this distinction, but kept the pot boiling while his colleagues were incarcerated, had to be rewarded with an honorary P.G. degree. This belief is that a conviction is an honour rather than a disgrace is not restricted to political offences. Some, who afterwards attained the highest positions in newly independent African states, had been convicted of crimes of dishonesty of which their fellow Africans were the victims. No one (apart from their immediate victims) thought much the worse of them on that account.¹⁴¹

Moreover, the concept of incarceration did not exist in the traditional society. Punishment was not separated from reparation for the

139. See generally Read, *Criminal Law in the Africa of Today and Tomorrow*, 7 J. AFR. L. 5 (1963). And see COTRAN, *THE PLACE AND FUTURE OF CUSTOMARY LAW, IN EAST AFRICAN LAW TODAY* 72, 79-81 (1966). It should be pointed out, however, that where customary courts exist, they try a large number of the total criminal cases, since most cases involve "minor offenses." In Northern Nigeria much of the general criminal law is administered by customary courts and under a different penal code. See Anderson, *The Northern Nigerian Codes: A Major Advance*, 24 MODERN L. REV. 616, 617 (1961); Williams, *Legal Development in Nigeria, 1957-1967; A Practicing Lawyer's View*, 11 J. AFR. L. 77, 78-79 (1967).

140. See the discussion of "legality" and its relationship to development in Seidman, *supra* note 138, at 1062-68. It is significant that in Ethiopia the first new code to be promulgated was a penal code and that a penal code had already been enacted as far back as 1930.

141. GOWER, *supra* note 95, at 33.

victim¹⁴²—the failure to provide for reparation as part of a judgment of conviction is still mystifying to Africans¹⁴³—and usually took the form of an order requiring the defendant or his family to make specific reparation or to pay a “fine” to the victim. In extreme cases, the defendant would be executed or banished. The imposition of imprisonment by the colonial power would not be considered “shameful” and was perhaps treated as an “experience” at the expense of the colonial power. The significance of incarceration with its supposed social stigma is thereby weakened for the African.

This mentality does not change overnight simply because the nation has now achieved independence. It will take some time “for the idea to seep through that the government is now ‘ours’ not ‘theirs,’ and that the laws are of ‘our’ making and ought morally to be obeyed.”¹⁴⁴ In terms of cultural identification between “the governors and the governed,” the new government may be no less alien to the mass of the people notwithstanding that the “governors” are African. It is this *attitude* toward the commission of “crime” that creates very serious problems, since the definition of what is anti-social, as reflected in the criminal law, may not comport with the peoples’ idea of what is morally wrong. As we know so well from our own experience, to make something “criminal” does not necessarily make it morally reprehensible. This problem is magnified in Africa, because this attitude may exist with respect to much of the conduct proscribed by the criminal law.

This is particularly true as regards crimes against property. In the traditional society theft was a very serious offense, and was severely punished.¹⁴⁵ If the theft were committed against a family member, family cohesion was threatened. Thefts against others would lead to retaliation and family feuding. For these reasons theft was the kind of crime that seriously threatened the social order, and social and moral stigma was attached. But theft against an outsider was something else again. Certainly no moral stigma could result from stealing from a “foreigner,” and once people were outside of their traditional group theft became acceptable. This attitude has persisted, and, of course, the extreme poverty of most of the people not only provides the impetus for such crime but brings moral approval. Throughout Africa theft has been on the rise, particularly

142. See the discussion of the forms and theory of punishment in ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 260-63 (1956).

143. See the discussion in GOWER, *supra* note 95, at 29-30. See also Brown, *The Award of Compensation in Criminal Cases in East Africa*, 10 J. AFR. L. 33, 37-39 (1966).

144. GOWER, *supra* note 95, at 34.

145. “While almost every other offense is attributed to circumstances rather than to character, that of theft signifies to the natives an unpardonable nature.” Dundas, *Native Laws of Some Bantu Tribes of East Africa*, 51 J. ROYAL ANTHROPOLOGICAL SOC. 217 (1921), quoted in ELIAS, *supra* note 142, at 141.

in urban areas where tribal and family loyalties are not present. In fact, there is evidence that a class of "professional thieves" has arisen, plying their trade in the urban areas. This same kind of attitude is reflected in the widespread corruption by public servants, involving not only bribe-taking on a wide scale, but also embezzlement of public funds.¹⁴⁶

Not only could the high incidence of such crime, particularly corruption, have serious implications for economic development,¹⁴⁷ but the mentality itself—in which all persons are seen as potential victims—threatens the social order. There is a need to "create a sense of solidarity with all men composing society,"¹⁴⁸ by combating this attitude. The goal is to end the suspicion and mistrust that a constant fear of theft must produce. The social significance of the increase in crimes against property cannot be ignored.

There are also a number of serious problems regarding crimes against the person. These societies are undergoing a rapid rate of cultural change, which creates serious tensions and considerably affects the incidence of mental illness.¹⁴⁹ This, in turn, may produce an increase in the rate of homicide and other crimes against the person. Very little research has been done into the mental health problems of African countries; and, of course, psychiatric facilities (and psychiatrists) are woefully lacking.¹⁵⁰ The difficulties that confront the courts in determining criminal responsibility are legion, and are compounded by the absence of psychiatric experts. Most courts, therefore, have held that the defense of insanity can be established without expert testimony.¹⁵¹ This is illustrative of the compromises that have to be made in the administration of the criminal law because of African conditions.

More significantly, there is the question of what is to be done with the criminally irresponsible defendant, since psychiatric facilities are so lacking. As a practical matter, the defense of insanity only serves to prevent the defendant's execution (the death penalty is regularly imposed for homicide throughout Africa); if he is found criminally irresponsible, he will still have to be confined and is not likely to receive very much in the way of therapeutic treatment.¹⁵² There is little probability that the person found to be criminally irresponsible will ever be able to be restored to society.

146. See the discussion in Read, *Minimum Sentences in Tanzania*, 9 J. AFR. L. 20, 24-25 (1965); Seidman, *supra* note 138, at 1065-67.

147. See KAMARCK, *THE ECONOMICS OF AFRICAN DEVELOPMENT* 244-45 (1967). The author points out, however, that the corruption is more of a hindrance than a serious threat.

148. SEKOU TOURE, *TOWARD FULL RE-AFRICANIZATION* 46 (1959).

149. See KAMARCK, *supra* note 147, at 242; Milner, *supra* note 18, at 1139-40.

150. See generally Milner, *supra* note 18, at 1134-38, 1140-41.

151. *Id.* at 1157.

152. *Id.* at 1140-42, 1165.

The most crucial problem area is that of determining what conduct should be brought within the criminal processes and how those processes are to be applied. The existing criminal codes are based on English law, and for the most part, English standards of "reasonableness" and criminal responsibility.¹⁵³ As one writer has observed, "any resemblance between the mores imminent in the codes and those of the people subject to them would seem largely accidental, like the broken clock that is right twice a day." Perhaps this is a little extreme, but the fact remains that the norms of existing criminal law are based on scientific premises while the world view of Africans living in the traditional society can only be characterized as pre-scientific. The African may commit acts which are logical within the framework of his understanding of natural processes, but which the criminal law, embodying a totally different sort of understanding, treats as criminal.¹⁵⁴

Perhaps the clearest example of this conflict is the matter of "witch murder." We confidently say today that witches do not exist, although not too long ago, as history goes, we were not quite so sure. But we are sure now, and homicide is homicide, even though the accused may have believed that what he was killing was not a human being, but a witch.¹⁵⁵ For many Africans, however, belief in witchcraft is an integral part of their world view, growing out of native theories about the psyche. Professor Seidman has described the "fearful dilemma" facing an African so believing, and how the courts have responded to it:

The Akan (one of the largest West African tribal groupings), for example, postulate man as tripartite. His physical body, a mere shell, encloses two indwelling souls, the *kra*, or life-soul and *sunsum*, or personality-soul. A wicked entity, the *obayi*, on occasion seizes dominion of the *sunsum* of a witch. Without her volition, her *sunsum* makes excursions from her earthly body. Free of physical restraint, it attacks the *kra* or *sunsum* of its victim by sucking it forth secretly from its material shell. As the *kra* is devoured, sometimes by degrees, sometimes in a rush, so the physical body of the victim withers. As the *sunsum* is destroyed, so will the victim's hope of worldly success disappear.

.....
The African who believes in witchcraft is thus faced by a fearful dilemma. He believes in witches to his bones. He knows that they can destroy his *kra* or *sunsum* in sundry mysterious ways, without chance for defense, so that both his physical being and his hope for earthly success are endangered, as much by threatened blow of panga or spear or matchet. He sees nothing in the societal order to which he can appeal for protection. His tradition approves of capital punishment for witches.

153. See generally *id.* at 1147-53; Seidman, *Witch Murder and Mens Rea: A Problem of Society Under Radical Social Change*, 28 MODERN L. REV. 46, 55-58 (1965).

154. Seidman, *Mens Rea and the Reasonable African: The Pre-Scientific World-View and Mistake of Fact*, 15 INT'L & COMP. L.Q. 1135, 1137 (1966).

155. See *Regina v. Machekequonabe*, 28 Ont. 309 (1897).

Faced by such dread forces, bereft of societal shield, terrified by the loss of the values at stake, some Africans not surprisingly have struck back in terror and in self-defense. How have the common law judges treated them when they were charged with murder?

The response of the courts has been practically unvarying: such defendants are guilty of murder.¹⁵⁶ But the verdict, with its concomitant death sentence, is in both West and East Africa almost invariably leavened with a judicial prayer that the executive reverse the decision just made. Such a formalized, indeed institutionalized reliance upon executive clemency at once negates any supposed deterrent effect of the death penalty and confesses a felt inadequacy for the judicial solutions to the problems posed by these cases.¹⁵⁷

It is these kind of problems that squarely pose the question of how law can be employed as a means of social control.¹⁵⁸

To simply apply the received criminal law, which has been developed in response to English needs and values, including a belief in scientific rationality, will not furnish sound solutions to these problems. The matter must be approached from the perspective of eliminating conduct that is *now* considered anti-social, because it runs counter to the norms and values of the new society that is in the process of creation, but which may not have been considered anti-social in the traditional society, a society in the pre-scientific stage. Likewise, attention must be paid to the method of dealing with the persons who have engaged in such conduct, both from the standpoint of eliminating that conduct and from the standpoint of restoring the offender to society. Reform of the criminal law to achieve these objectives is a matter of urgent priority.

How, then, can the technique of law, in this context that part of it denominated as the criminal law, be employed to change existing behavior patterns? When this question is applied to the emerging nations of sub-Saharan Africa, it is clear that the suitability of punitive sanction as a method of effecting change will have to be considered most seriously. For rehabilitative facilities are simply lacking, and they will not be given high priority in future planning. There is a pressing need to change behavior patterns as soon as possible, and for want of any better method, great reliance may have to be placed upon punitive sanctions. Since it may be anticipated that the foundation of the criminal law in these countries will be the punishment of offenders as a means of deterrence,¹⁵⁹ a field laboratory to test the soundness of the deterrence theory of criminal law will now exist.

156. Among the defenses that have been attempted are lack of *mens rea*, self defense or defense of others, mistake, insanity and provocation. Seidman, *supra* note 153, at 48.

157. *Id.* at 46-48.

158. For a discussion of other problem areas see Seidman, *supra* note 154.

159. See the discussion of the deterrence concept as the basis of the Ethiopian Penal Code in Graven, *The Penal Code of the Empire of Ethiopia*, 1 J. ETHIOPIAN L. 267, 288 (1964).

This deterrence is likely to prove more effective in regard to crimes against property, where there is greater opportunity for conscious choice, than in regard to crimes against the person, often the result of emotional or mental disorder or pre-scientific belief. The question is whether severe and certain punishment for crimes against property will prove to be an effective deterrent, that is, whether the legal sanction can alter the behavior patterns. The goal is not necessarily to alter the value—that there is nothing morally wrong about stealing from a stranger or foreigner—but to change the behavior pattern by imposing a severe sanction for acting upon the value.

Such an effort has been made in Tanzania, for example, by the enactment of the Minimum Sentences Act of 1963, which provides a minimum prison sentence *and corporal punishment* for offenses against property such as theft, robbery, cattle stealing and the like.¹⁶⁰ Depending on the offense, the minimum sentence may range from six months to three years, but the corporal punishment is the same, twelve strokes of the lash at the commencement of the imprisonment and twelve additional strokes on the day before the prisoner's release. Such an approach "stands squarely as a distinct and marked change in penal policy, representing a clear dissent by an independent nation from the policies of the former colonial power."¹⁶¹ Ethiopia has also introduced corporal punishment for offenses against property,¹⁶² and other nations may be following suit. Another method of deterrence, at least in cases where the defendant has something of his own, might be to adopt the customary practice whereby the thief was not only required to make compensation to the victim,¹⁶³ but to surrender some of his own property as "punishment."¹⁶⁴ The "pinch of the pocketbook" may prove to be as effective as the "sting of the lash." In any event, it is clear that the problem of theft and other crimes against property must be faced. An existing pattern of behavior—if not the underlying values giving rise to it—must be altered, and the law, through the imposition of severe sanctions for engaging in such conduct, may be able to reduce its incidence. In this situation a clear test of whether the criminal law can effectively be employed as a means of social control will be made.

Dealing with the problem of crimes against the person is much more complicated, for here the fact that many Africans are still living in the pre-scientific society looms large. The situation is further aggravated by the absence of psychiatric and rehabilitative facilities.

160. Read, *supra* note 146.

161. *Id.* at 24.

162. This provision was added when the Code was being considered by Parliament. See the discussion in Sedler, *supra* note 20, at 580-81.

163. Provisions for the award of compensation to the victim are provided in the Tanzanian Act.

164. See ELIAS, *supra* note 118, at 140-41.

Rechannelling of behavior patterns is necessary, but it will not be accomplished by merely stepping up the sanction—in the case of homicide, the ultimate sanction is now employed (along with a restrictive standard of criminal responsibility). To put it bluntly how do you stop people from killing witches? And what do you do with someone who has killed another, sincerely believing that the victim was a witch? Even if punishment would have a deterrent effect on others, which may be questionable, this “utilitarian” solution conflicts with the humanitarian value that a particular individual should not be punished when he cannot fairly be held responsible.¹⁶⁵ The original solution, to find the person guilty, but to imprison him after commutation by executive clemency, may have been an attempt at compromise in light of practical conditions.¹⁶⁶ Perhaps the same solution could now be institutionalized, as suggested by Professor Seidman.¹⁶⁷ The “guilty verdict” would merely mean that the accused would be “subject to the administrative process of re-education.” While the absence of rehabilitative facilities presents difficulties, some efforts could be undertaken. More importantly, the “witch-killer” would be identified, and the necessity for the maintenance of social order would require his removal from society. Only after he was considered “re-educated,” if ever, would he be returned. This would have the necessary deterrent effect on those persons “deterable,” and at the same time would not conflict with humanitarian values. By the same token, efforts are now being made to eliminate the other behavior pattern giving rise to the problem, by acting on the “witch.” There has been widespread enactment of anti-witchcraft legislation, with almost absolute liability and severe penalties.¹⁶⁸ Again, the threat of sanction must be relied upon to deter those persons who “play at witchcraft” and deliberately take advantage of the superstitions of others living in the traditional society.¹⁶⁹ In other words, the law must deal with the problem of witch murder directly and attempt to find some solution by the imposition of sanctions designed to change behavioral patterns. The problem will not be solved in any rational way by the application of doctrines and concepts from the received English law.

Our discussion of the problems of theft and witch murder illustrate the kind of reform of criminal law that must take place.¹⁷⁰ It is

165. Seidman, *supra* note 153, at 57.

166. *Id.* at 58.

167. *Id.* at 60. See also his discussion, *supra* note 154, at 1160-64.

168. Seidman, *supra* note 154, at 1154.

169. But again, this must take account of those “witches” who are not acting “deliberately.” See the discussion in Seidman, *supra* note 154, at 1155-56.

170. There are a number of problems in the area of criminal procedure as well, perhaps the most significant of which is the need to distinguish between the function of the state and that of the private prosecutor. The Ethiopian Criminal Procedure Code contains a number of provisions designed to reconcile these interests. See the discussion in Sedler, *supra* note 20, at 624-25.

in this area that the use of law as a technique for social ordering will be most crucial. The criminal law will have to be employed to change patterns of behavior that are detrimental to social stability and the objectives of the modern society. The result should be a new body of criminal law designed to deal with the problems of behavioral control that exist in a society undergoing radical social change.

C. *Law and the Family*

Equally significant issues are presented in the area of the law applicable to family relations. The fundamental question is whether the law will be employed in an effort to change existing patterns of family life, if such patterns are found to be detrimental to the objectives of the modern society. Family life in the traditional society revolves not only around the nuclear family, that is, husband, wife and children, but perhaps more importantly around what is called the extended family. When we talk about the "family" in the traditional society, we are talking about a social institution consisting of persons who are descended from a common ancestor and who owe allegiance to that institution.¹⁷¹ The family in this sense is a legal institution; as we will see in the next section, property may be owned by the family rather than by the individual members. More significant is the operation of the family as a social institution. Not only is allegiance owed to the institution as such, but inter-personal relations and obligations exist between all members. One's family responsibilities have a much broader connotation in traditional African society, as any educated and prosperous African will be quick to point out. This was reflected in the customary law, where the family was held responsible for certain actions committed by one of its members, but the social obligations of the family to its members (and of one member to another) are far in excess of the legal requirements.¹⁷² It is this institution, having legal and social significance, with which "family law" must be concerned.

Naturally enough, a very comprehensive body of customary law developed with respect to the family,¹⁷³ and customary family law, in turn, becomes an integral part of the traditional society. The extended family system was fully consistent with the objectives of the colonial power, and customary law was allowed to operate in this domain.

The colonial powers also introduced their own law of marriage, and in those countries where there was a large Moslem population,

171. OBI, MODERN FAMILY LAW IN SOUTHERN NIGERIA 10 (1966).

172. *Id.* at 17.

173. This is, in essence, a law relating to status. ELIAS, *supra* note 142, ch. 6.

marriage could also be contracted under Islamic law.¹⁷⁴ The essential difference between "ordinance" and customary (also Islamic in this regard) marriage was that ordinance marriage was monogamous while customary marriage was polygamous. The vast majority of marriages were and still are contracted under customary law.¹⁷⁵ The legal situation, recognizing ordinance, customary and religious marriage was retained in practically all countries after independence. Thus, there are two and sometimes three separate systems of law to govern marriage, divorce, custody, succession and the like.¹⁷⁶

When we are talking about customary law, we must remember that we are talking about the law of a particular ethnic or tribal group. These laws may differ in certain respects, and there also may be variation from area to area and even from village to village,¹⁷⁷ which will give rise to problems of "internal conflict of laws." However, it has been contended that often the results of the application of different customary laws are "surprisingly similar as between the different ethnic groups."¹⁷⁸ If this is so, and only empirical investigation can tell, it has important implications as regards the imposition of a uniform family law. At present, however, for the vast majority of Africans the family law is that of the particular tribe or ethnic group.

The most important feature of the nuclear family is that it is polygamous. During the colonial period, no effort was made to end the practice, and the courts upheld the validity of polygamous marriage.¹⁷⁹ In fact, there was very little interference generally with the operation of customary family law.¹⁸⁰ Africans who marry under the ordinance may not legally take a second wife, but in practice this often occurs.¹⁸¹ Interesting questions also arise as to whether the entry into an ordinance marriage means that all aspects of family life are to be governed by English law.¹⁸² Many problems are created by the plurality of marriage laws, both as regards conflicts between the received law and customary law and between the

174. See generally ALLOTT, *ESSAYS IN AFRICAN LAW*, ch. 8.

175. TWINING, *THE PLACE OF CUSTOMARY LAW IN THE NATIONAL LEGAL SYSTEMS OF EAST AFRICA* 19 (1964); KASUNMU & SALACUSE, *NIGERIAN FAMILY LAW* 16 (1966).

176. In the Sudan the received English law is inapplicable in family matters. Where the parties are Moslem, the matter is governed by Islamic law; if they are not, customary law applies (subject to the repugnancy and inconsistency provisions). See generally FARRAN, *MATRIMONIAL LAWS OF THE SUDAN* 14-18 (1963).

177. KASUNMU & SALACUSE, *supra* note 175, at 24-26.

178. OBI, *supra* note 171, at 4.

179. KASUNMU & SALACUSE, *supra* note 175, at 17-18.

180. *Id.* at 18-19. As the Privy Council has observed:

"The principles of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy." *Dawodu v. Danmole*, [1962] 1 W.L.R. 1053, 1060.

181. TWINING, *supra* note 175, at 19.

182. See the discussion in ALLOTT, *supra* note 174, at 218-20.

different systems of customary law. This, in itself, would indicate the need for some reform in the present approach. But more important is the question of how the law will deal with the institution of the family as the nation moves toward modernization and rapid economic development.

The social change that is going on cannot help but affect the existing institution. As migration to urban areas take place, family ties are loosened, and emancipated members may seek to sever the family relationship.¹⁸³ The crucial issue is how the law should relate to the extended family when this change is occurring. A further question is whether uniform family law is possible or desirable. We may start off by considering some of the problems presented by the existence of the present family structure, by which we mean the extended family system, polygamous marriage, and the customary patterns of relationship between spouses and between family members. What are the implications of the present family structure (and the law governing it) for modernization and economic development?

As we will see in the next section, the present system of land tenure is bound up with family ownership of land. A change in the existing family structure might cause a change in patterns of land holding. However, the matter of land tenure will have to be dealt with directly, and even if that is changed, the family structure will not necessarily change in turn. For this reason, it is possible to consider the family structure without regard to traditional land tenure, although the relationship between the two should always be kept in mind.

We may now concern ourselves with the institution of the family as it relates to modernization and social change. Let us first consider the extended family. An analysis of its role and functions reveals a mixed picture, since in some respects it hinders economic development and modernization, while in other respects it could assist it. With regard to economic development, one author has observed:

Unfortunately, in terms of potential economic development, the extended family system has many drawbacks: it tends to discourage individual enterprise and initiative, as the burden of family obligations rises with the degree of an individual's success. A big man in the family is expected to be generous in helping others with school fees, doctors' bills, "brideprice," financing weddings and funerals and hospitality to all relatives. Consciously or unconsciously, the knowledge that a greater income will mean correspondingly greater burdens must inhibit the efforts an individual puts forth.¹⁸⁴

There are other drawbacks: family crises tend to prevent accumulation of, or to drain away, any capital that may have been accumulated. Not only are savings in general held down, but the proliferation of small entrepreneurs is prevented. Because people

183. See the discussion in OBI, *supra* note 171, at 36-40.

184. For an interesting description of "supporting two families," one modern and one traditional, see TURNBULL, *THE LONELY AFRICAN* 31-34 (1962).

with small incomes find it hard to comprehend the greater costs of living of individuals with higher incomes, a successful civil servant or company employee may be unable to withstand the pressure on him to contribute to other members of the family and still live in the style that he and his family believe is socially necessary. Hence, the temptation to accept bribes or to "borrow" from public or company funds may become great. . . .

One of the problems of small business everywhere is the difficulty the small businessman has in comprehending the differences between "income" on the one hand, and amortization and replenishment of capital on the other. If he is under pressure to give help to meet some family crisis, convincing other members of the family that the cash he has in the till is not "income" may be almost impossible. This is, in fact, one of the main causes of the failure of some of the programs to provide loans to small businesses in Africa.¹⁸⁵

The above discussion demonstrates most clearly how the matter of family structure and values inherent in that structure cannot be separated from economic development and modernization.

On the other hand, as the same author points out,¹⁸⁶ the extended family system provides certain economic advantages. Small contributions from many family members may be pooled to finance the education of a bright child. The family can and does serve as a mutual aid society, although as has been pointed out, this is to the detriment of the more prosperous members. Still, the need to provide for one's extended family could in some cases spur the particular individual to more productive effort. A very important advantage of the extended family is that the family's assets could serve as security for small loans given to individual members, and the family can pool its credit to borrow money. The author's conclusion is that:

On balance, the extended-family system in Africa so far has probably inhibited economic development more than it has helped, but there is a considerable potential for the good—for example, if the extended family were guided more in the direction of acting as a kind of mutual-investment fund or trust. . . . If the family system became an effective way to collect small savings and use them to finance the enterprises of its most capable business members, it could become one of the most potent engines of economic development in Africa.¹⁸⁷

On the other hand, the extended family system as a social institution in present-day Africa has a great deal of utility. The resources of these countries to provide social welfare services are quite limited, so that priority of services becomes a most important consideration in the development of social welfare programs.¹⁸⁸ Where a mechanism exists in the society for dealing with certain problems, it may be unnecessary to provide social welfare services in those areas, and in African societies the extended family system may pro-

185. KAMARCK, *supra* note 147, at 50-51.

186. *Id.* at 52-53.

187. *Id.*

188. Rozanne Sedler, *Social Welfare in a Developing Country: The Ethiopian Experience*, 11 J. INT. SOCIAL WORK 1 (1968).

vide for needs that in a more developed society—where ties to the extended family have been substantially lessened—would come within the ambit of organized social welfare services.¹⁸⁹ For example, where the extended family assumes responsibility for child rearing, it is not necessary for the government or the organized community to provide for abandoned or neglected children.¹⁹⁰ In other areas, the family may provide assistance in implementing social welfare programs.¹⁹¹ Clearly, the institution of the extended family performs useful societal functions, which if it did not exist, would have to be met by other means.

Obviously, there is no question of employing the law in an attempt to abolish the extended family system. Clearly, this is not within the law's purview, since the law cannot act upon the values and attitudes that people have with respect to family relations. However, it is very relevant to consider whether these attitudes and values will be reflected in legal norms giving the institution power over its members. The law must define the legal relationship between the extended family and the individual member, particularly in light of the social change that is taking place as a result of modernization. If the extended family is to continue to perform its useful social functions and is to realize its potential for assistance to its members, what legal authority it is to have with respect to the individual? To what extent is it to be permitted to exercise control over his behavior? Can it require him to make economic contributions to the family? Insofar as the family as an entity owns property, what are the rights of the individual with respect to that property?¹⁹² Does an individual have legal rights to assistance, and by the same token, can the family compel an individual to render assistance to other family members? Can an individual be expelled from family membership? It is these kinds of questions with which the law must be concerned. Here, we are talking about the use of the law to compel individuals to conform to behavior patterns called for by the values of the extended family system.

For the most part the legal powers of the family over individual members have been eroded. In southern Nigeria, for example, the family head can no longer represent the members in legal proceedings or compel them to submit disputes to him. The powers of the family head and family council largely center around the management and

189. *Id.* at 6-7.

190. *Id.* at 7.

191. *Id.* at 8-9. The author uses the example of marriage counseling. She concludes that the existing societal mechanism is not fully adequate in Ethiopia, but that with assistance from trained social workers, the traditional authorities could improve the service they are now rendering.

192. This question cannot be separated from the broader one of whether the present system of land tenure should be retained, which will be discussed in the next section.

allocation of family property.¹⁹³ The same kind of change has occurred elsewhere.¹⁹⁴ There is no reason for the law to attempt to arrest the growing tendency of individuals to emancipate themselves from the control of the extended family. In other words, the law should leave the extended family system alone, to evolve in response to changing conditions. Insofar as broader loyalties, such as to the nation, are envisioned, no effort should be made to encourage more restrictive ones. Here the value of individuality becomes important, and it is not likely that the law will be employed to increase the power of the extended family over its members. But, by the same token, insofar as the individual desires to remain a member of the extended family, this value should also be protected.¹⁹⁵ The real question today concerns the power of the extended family over family property, and this will be discussed in the next section.¹⁹⁶ But as regards the power to control individual members, this power has been eroded, and it would not be sound nor consistent with the values of the modern society to attempt to reinstate it.

The most significant area of family law today then, will be that governing relationships within the nuclear family. Here the law must deal with marriage and divorce, relations between spouses, and rights and duties with respect to children. An important question will be whether unified law is possible in this field. If there is not a great dissimilarity between different customary systems, it should be possible to fashion such a law, and within the context of the new and uniform law to make any reforms considered necessary to change existing behavior patterns.¹⁹⁷ However, it must be remembered that here we are dealing with an area of law affecting interpersonal relations, and one that may be grounded in tradition and religion. For this reason the present "permissive policy" of leaving such matters to customary law unless the parties have contracted an ordinance marriage and evidence the intention to abandon the traditional way of life,¹⁹⁸ is understandable. Nonetheless, this vital area, with its

193. OBI, *supra* note 171, at 27-30.

194. See the interesting discussion of the individual and group in ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 83-87 (1956).

195. See the discussion of this point in OBI, *supra* note 171, at 37-40.

196. The question of the liability of the extended family for the torts of its members cannot be separated from the institution of family property. If the family as a legal entity "owns" property, such liability may be imposed as it was in customary law. If individual ownership, however, is to take place, there would seem to be no justification for imposing vicarious liability on members of the extended family or on the family as an institution. On the subject generally see Deng, *The Family and the Law of Torts in African Customary Law*, 4 HOUSTON L. REV. 1 (1966).

197. This was the approach taken in Ethiopia. See the discussion in Sedler, *supra* note 20, at 598.

198. For a discussion of some of the problems in determining whether customary or received law is to apply to Africans in this area, see Phillips, *Marriage and Divorce Laws in East Africa*, 3 J. AFR. L. 93 (1959). ALLOTT, *supra* note 174, at 209-18.

implications for economic development and modernization, cannot be ignored. As we will see, a number of efforts at reform have already begun. There are two basic questions to be considered. The first is whether it is possible to establish a uniform body of family law which will be sufficiently acceptable to all the ethnic groups in the nation. The second, and more important, is whether the law should be employed in an attempt to change existing patterns of family relationships and behavior which may be detrimental to the objectives of development and modernization. Since we are here dealing with inter-personal relationships and behavior patterns which are deeply-rooted in tradition, any attempt to employ the law as a technique of social ordering should not be undertaken lightly, and the anticipated degree of resistance must be taken into account. The limitations on law as a technique of social ordering must be realized, and it may be necessary to leave some matters to the evolutionary change that will be brought about by modernization and the resulting changes in values.

When we examine the present behavior patterns with respect to the nuclear family, our concern can focus primarily on the institution of polygamy and on the position of the wife in the marriage relationship. Forced marriages, particularly of young girls, are recognized in certain systems of customary law. Likewise, in some systems levirate marriage prevails, and generally provision is not made for support of the widow after her husband's death. Finally, a customary marriage is usually capable of being dissolved without the limitations imposed by a rigid set of "grounds for divorce."¹⁹⁹ While marriage may be something more than the "transfer of the wife's reproductive organs from her family to that of the husbands,"²⁰⁰ the fact remains that the primary loyalty of each spouse runs to his or her extended family, and the marriage in customary society is not regarded as an enduring (or endearing) relationship.²⁰¹

Again, this attitude toward the marriage relationship and the blood family is not something that is within the power of the law to change. Moreover, if the primary function of marriage is to insure the procreation and protection of children, customary marriage performs the function well.²⁰² Rather the question is whether the social problems which may be caused by the operation of present family system can be reached by legal action. These problems essentially rise from the inferior status of women in the traditional society. It is said that in customary law women are in "perpetual minority."²⁰³

199. See the discussion in TWining, *supra* note 175, at 19-20.

200. See Deng, *supra* note 196, at 27-28.

201. See the discussion in ALLOTT, *supra* note 174, at 213-14.

202. For some interesting variants resulting from the fact that the primary purpose of marriage in African society is procreation, see Deng, *supra* note 196, at 7-11.

203. Phillips, *supra* note 198, at 97.

Prior to marriage they are under the control of the male head of their family; during marriage, under the control of the husband; when the marriage terminates by death or divorce, they are either forced into levirate marriage or revert to the control of their own family. They may be forced to enter into marriage, sometimes at a very young age. And, of course, polygamy is widespread, which may further aggravate the disadvantaged status of the wife.

Various efforts have been made to deal with some of these problems. In some places legislation has been enacted setting a minimum age for marriage and voiding all marriages, including customary ones, where a party is below that age.²⁰⁴ However, whether there has been compliance is questionable,²⁰⁵ and in this kind of situation the ability of the law to change behavior patterns by the imposition of sanctions is limited. Other legislation has prohibited levirate marriages, while providing support for the widow and children of the deceased.²⁰⁶ Efforts have also been made to give the widow custody of the children in preference to the husband's family.²⁰⁷ Malawi made a "radical change" in succession by providing that in case of intestacy, four-fifths of the deceased's property should pass to the wife and children while only one-fifth would pass under customary law,²⁰⁸ which is contrary to the almost universal rule of customary law denying spousal succession and keeping the property in the blood family.²⁰⁹ Further reform along these lines may be anticipated, particularly if efforts to establish a uniform family law are undertaken.

The most serious social implications, however, are those that arise from polygamy and unlimited divorce. In this respect the situation is the same as in Islamic countries, where Sharia law not only authorizes polygamy, but appears to make it a duty.²¹⁰ During colonial times polygamy was tolerated, and no attempt was made to suppress it by legislation. Instead it is said that "reliance was placed on the gradual advance of education and enlightenment and on the pressure of economic and social conditions favoring monogamy."²¹¹ Polygamy is a sound institution in the subsistence society,

204. See KASUNMU & SALACUSE, *supra* note 175, at 77.

205. *Id.*

206. See Phillips, *supra* note 198, at 98.

207. See KASUNMU & SALACUSE, *supra* note 175, at 19-20.

208. See Roberts, *A Revolution in the Law of Succession in Malawi*, 10 J. AFR. L. 21 (1966).

209. Efforts to provide for spousal succession in Ethiopia were rejected by the Codification Commission. See the discussion in Sedler, *supra* note 20, at 582.

210. In Sub-Saharan countries such as the Sudan and Somalia, which have predominantly Moslem populations, the problem will have to be approached in the context of reform of Sharia law. On that subject see ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD*, ch. 3 (1959). The discussion that follows deals with polygamous marriage under the customary laws of non-Moslem peoples.

211. Phillips, *supra* note 198, at 95.

where more wives and children mean that more land can be worked. But it is completely unsuited for life in urban areas, where people work for wages and living space is limited.²¹² Moreover, changes in the system of land tenure may or may not affect the economic feasibility of polygamy. If an individual may acquire fairly extensive quantities of land, large number of wives and children would still be useful. But to the extent that land holdings are consolidated in cooperatives and the like, the utility of the institution will be lessened. And insofar as people begin to work for wages, plural marriage will be a burden rather than a blessing. The point I am trying to make is that among Africans, other than Moslems, there seem to be no religious strictures surrounding the institution, and it is economic factors that apparently determine its incidence. As economic conditions change, it is likely to decline, and it is questionable whether affirmative action to eliminate it immediately is vitally necessary.

On the other hand, the duality of the present legal system, with monogamous marriage under the ordinance and polygamous marriage under different regimes of customary law, may give some impetus for reform. A decision may be reached to hasten the decline of polygamy by what may be called the "gentle persuasion of the law" rather than by severe sanction. This could take the form of providing for registration of marriages and allowing the registration of only the first marriage. Only the "registered" wife would have legal status. This approach had some positive effect in Turkey, where during the Korean War, it was realized that only a "legal marriage" would justify marriage allowances and widows' pensions.²¹³ In other words, a practical compromise would be reached. Under the law only monogamous marriage would be recognized—although we would hope that the children of the other "wives" would not be penalized.²¹⁴ But no affirmative sanctions would be imposed against persons who entered into polygamous unions, *e.g.*, bigamy would not be made an offense. Other efforts aimed at encouraging its decline might be tried. The point is that a decision will have to be made as to whether or not the law will be employed at this time to attempt to alter this pattern of behavior, or whether the solution of the problem can be left to evolutionary social change and the resulting change in values. It is doubtful, however, that a uniform family law would give legal recognition to polygamy.²¹⁵

We may next consider the matter of divorce. It is now clear that

212. See Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 WIS. L. REV. 999, 1002.

213. See ANDERSON, *supra* note 210, at 89.

214. The rights of children can be established through filiation, which need not depend on their "legitimacy."

215. For the view that the abolition of polygamy must be a "response to social change," see FRIEDMANN, *LAW IN A CHANGING SOCIETY* 11-12 (1959).

in Moslem societies, it was the Islamic law of divorce, not polygamy, which was the major cause of suffering of women.²¹⁶ African customary law differs markedly from Islamic law in this respect, and the women receive somewhat more protection. Although grounds for divorce, as we know them, are not required, the husband cannot unilaterally terminate the marriage as he may under Islamic law. The marital problems are submitted to the families of the spouses, and efforts at arbitration are undertaken. If the parties cannot be reconciled, the arbitrators settle accounts and decree the divorce.²¹⁷ So long as adequate protection is given to the wife, particularly support and perhaps a right to custody of the children, customary divorce will not cause her suffering. Existing practices in this regard must be carefully explored, and changes may have to be made to insure that the wife is adequately protected.

Thus, the institutions of polygamy and unlimited divorce, while somewhat disadvantageous to the woman, do not for the most part create such serious social problems that immediate and sweeping corrective action is necessary. In fact, research into actual practices may indicate that the position of the woman in the traditional African society is not so disadvantaged as is generally believed.²¹⁸ Particular problems such as forced and levirate marriage and protection for the wife upon dissolution of the marriage, can be dealt with directly, but the practical effect of these reforms may not be felt immediately. Polygamy is likely to decline as economic and social change takes place. For these reasons, extensive law reform in these areas is not likely to be undertaken at the present time.

A further question may arise as to the basis of divorce. Again, under the present system there are two radically different approaches to divorce: consensual divorce under customary law and "grounded" divorce under the received law. If the law is to be unified, and a single law of divorce is to be established, how are these seemingly contradictory approaches to be reconciled? I would submit that here the received law could "learn" from the customary law. We are coming more and more to realize that there is only one true ground for divorce, that of "incompatibility." We also know that the great majority of divorces that are granted in our courts are completely consensual with "grounds" often being fictitious. In the rare case when a divorce is contested, it is usually for financial or religious reasons. The African family pattern has been one of relative stability notwithstanding frequent divorce and remarriage, even within the polygamous structure. Moreover, the use of family arbitrators rather than the courts to deal with marital problems has the further ad-

216. ANDERSON, *supra* note 210.

217. See ALLOTT, *supra* note 174, at 220-21.

218. See generally PAULME, *WOMEN OF TROPICAL AFRICA* (1963).

vantage of providing the opportunity for reconciliation.²¹⁹ This question was faced in Ethiopia at the time of the adoption of the Civil Code. The traditional practice authorized divorce, in effect, when one of the parties insisted on it. The drafter proposed that divorce be granted only on certain grounds, but the Codification Commission rejected the proposal. Again, in keeping with tradition, the code provides for marital arbitration, and the courts have no jurisdiction except to "homologate" a divorce granted by the family arbitrators. The arbitrators have a period of time within which to try to reconcile the parties, but if that fails divorce must be granted.²²⁰ The same solution would probably be very sound for most African countries. There is no need for the courts to bother with divorce—a proposition with which most lower court judges in this country would agree. Marital difficulties would be referred to family arbitrators, and the traditional procedures would be institutionalized in the new law. The arbitrators would try to reconcile the parties, as they have been doing, but if this failed, they would decree the divorce, make a property settlement and award custody of the children. Perhaps provision might be made for the court to review property settlements and custody awards if there was objection. The customary approach to divorce did not threaten family stability, and may be sounder for the modern legal system than that found in the received law.

Our analysis of the African family system, then, has led us to the conclusion that it is not necessary to employ the process of the law to attempt a radical social reordering at this time. Law reform in this area should take the form of the establishment of a uniform body of family law to eliminate "the uncertainties and anomalies made possible by a plurality of marriages law, which lead to situations 'too fantastic for the plot of a comic opera.'"²²¹ If there is substantial similarity among the different customary laws in essential matters, this should not be difficult. Particular problems such as forced and levirate marriage and protection for the wife upon dissolution of the marriage, can be dealt with directly. Whatever "legal" position is taken with respect to polygamy will probably not make much difference. The institution cannot effectively be eliminated at this time, and it does not appear to be detrimental to economic progress and social stability. More importantly, it apparently is rooted in economic factors rather than in deeply-held religious values, and as economic and social conditions change, it will gradually disappear. The traditional approach to divorce and the resolution of family difficulties has much to commend itself for the modern society, and it can be incorporated into the legal system. A unified system of family law along

219. We are now attempting to "build-in" reconciliation by establishing family courts or attaching social workers to the courts. However, by the time a case reaches that stage, it is probably too late for reconciliation.

220. See the discussion in Sedler, *supra* note 20, at 598.

221. TWINING, *supra* note 175, at 20.

these lines would, it is submitted, be suitable for these countries at this time.

LAW REFORM AND ECONOMIC DEVELOPMENT

As we pointed out at the beginning of the writing, economic development is the focal concern of the emerging nations of sub-Saharan Africa. If this is so, the most significant aspect of law reform is likely to be in those areas of the law that regulate economic relationships. It is here that the use of law as a means of changing patterns of behavior will have the most immediate effect, and for this reason the matter of law reform cannot be separated from the objectives sought to be achieved by economic development. It will be the function of the law to implement these objectives, so that law reform in this context becomes an integral part of the planned economic development that is taking place.

A. *The African Economic Picture*

The level of economic development in African states at the time of emergence demonstrates the necessity for radical change in patterns of economic behavior. This level of development is reflected in the conditions of African life, and the situation has been described as follows:

Traditional systems of cultivation and grazing, characterized by low production per man and low productivity per acre, prevail over the larger part of the tropics. The rates of illiteracy, incidence of disease, infant mortality and death remain high. The per cent of persons actually attending school is low, particularly for high schools and advanced educational institutions. Standards of housing and sanitation often leave much to be desired. Diets are not usually short in provision of calories, but protein intake is below requirements despite the very large livestock population of the continent. . . .

Average annual per capita incomes for tropical Africa are about \$110-115, with some countries still having averages half that level. . . .

About three-fifths of the total cultivated area of tropical Africa is still devoted to subsistence production, which occupies over half the adult population. In 1965, tropical Africa accounted for only about 2.79 per cent of total world imports and 2.69 per cent of exports. Its population is about 6.55 per cent of the world total. . . .²²²

It was on this basis that the efforts at planned economic development were undertaken.

Thus far, the results of these efforts have been mixed. There are striking contrasts in the rates of economic advance from country to country and within individual countries.²²³ Realistically, there are economic "islands" in which the bulk of the economic output is

222. HANCE, *AFRICAN ECONOMIC DEVELOPMENT* 2-3 (1967).

223. *Id.* at 5.

highly concentrated, and these "islands" are often separated by great spaces in which the exchange economy is poorly developed. It is these islands—classified as either coastal, highland or mineral—which account for at least 85% of economic output, although they comprise less than 5% of the total land area.²²⁴

The growth rate of the African economy has now slackened. In the period from 1945 to 1960 economic growth in Africa was at least as fast as in any other underdeveloped region, with the gross national product rising between 4 and 6 per cent per year in real terms. During those years some \$15 billion of capital from abroad came into Africa, making possible the minimum infrastructure for development.²²⁵ However, this growth slowed down in the post independence period, notwithstanding the directed efforts at economic development that were being made. In the "development decade" of the 1960's, growth has been between 3 and 3.5% at a time when population was increasing at a rate of 2.4%.²²⁶ Of course, the base level was higher, but this is not the only explanation for the slowdown. There has been a markedly unfavorable change in the terms of trade for most countries, affecting however, the various countries unevenly and differently from year to year. African countries are essentially exporters of primary products and importers of secondary products. Prices of primary products are less subject to control by the producers, and extensive production depresses prices. African countries, on the whole, must pay prices that are between 10 and 15% higher than they were in 1955-57 while the prices of the commodities they sell decreased year by year to 1962, although they have recovered somewhat since. The result is that African terms of trade are still 10 to 20% below 1955-57 levels.²²⁷ There has also been a reduction in the rate of capital investment and a flight of capital from some countries.²²⁸ Political upheavals in some countries could not help but have an adverse effect on the economy, discouraging influx and encouraging outflow of capital. The rapid transfer from colonial to independent government, with the departure of trained expatriate personnel, has caused the standard of administration to deteriorate.²²⁹ And the planning process itself has produced a number of failures.²³⁰

All of this merely means that improved and redoubled efforts are necessary. Planning and efforts at rapid economic development will continue apace, although this now may be tempered with a better sense of the "really formidable problems that beset development in

224. *Id.*

225. KAMARCK, *THE ECONOMICS OF AFRICAN DEVELOPMENT* 17-18 (1967).

226. HANCE, *supra* note 222, at 7.

227. KAMARCK, *supra* note 225, at 18-19.

228. HANCE, *supra* note 222, at 7.

229. *Id.*

230. *Id.* at 6; KAMARCK, *supra* note 225, at 210-15.

underdeveloped areas."²³¹ In fact, it has been contended that the results could have been more unfavorable and that there has been "relative success" so that "even with all of her inexperience, Africa's efforts to achieve economic development compare favorably with those of the major developing regions of the world."²³² Whatever the analysis of the degree of success achieved thus far, the fact remains that the process of planned development will continue, and the law must be employed to aid in that process.

The basis of economic development will necessarily be agriculture. Some 92% of the Africans still live on farms. Almost two-thirds of Africa's exports are agricultural products, and these are the principal source of foreign exchange earnings for practically all African countries.²³³ Likewise, agriculture produces from 50% to as high as 70% of the gross national product in a given country.²³⁴ As a result:

For most African countries, then, it is agriculture that must be depended on: to raise the standard of living of the people initially, to provide the minimum market necessary for manufacturers to get a foothold, to earn the necessary foreign exchange to pay for imports, and to provide the revenues to finance needed government services. The improvement of agriculture must be the central part of any development program.²³⁵

When we are talking about economic development in Africa, then, we are talking essentially about the development of an agricultural economy.

This, in itself, presents problems. Unlike manufacturing, the conditions of agricultural production—climate, soil, plant and animal disease, and the like—cannot be easily controlled. In agriculture, management has to be highly decentralized, and the individual farmer or worker in the fields must constantly be making decisions. So much more so than in manufacturing, does success depend on the productivity of the individual worker, on his attitude toward work and his power to make intelligent decisions.²³⁶ Nor can production be limited as in manufacturing so as to regulate the supply and with it the price of the product.

But in Africa the problems of agricultural development are still more complex. The agricultural economy that presently exists is to a large extent based on subsistence farming in which the farmer produces mainly to feed himself and his family.²³⁷ As long as farming is carried on for this purpose, shifting cultivation, involving the use

231. HANCE, *supra* note 222, at 7.

232. KAMARCK, *supra* note 225, at 29.

233. *Id.* at 89. See also HANCE, *supra* note 222, at 20-21.

234. KAMARCK, *supra* note 225, at 32-33. Only in Zambia, Kinshasa (Congo-Leopoldville) and probably Mauretania among the states of black Africa (we necessarily exclude South Africa) does the contribution of mining and manufacturing to the gross national product exceed that of agriculture.

235. *Id.* at 89-90.

236. *Id.* at 90.

237. *Id.* at 99.

of weak soils, is more likely, since this method produces the bare minimum for survival.²³⁸ In fact, in terms of the activity of the average African, the subsistence element is the dominant one in the total economy. The amount of time that an African spends on activities that merely keep him alive and functioning is greater than the amount of time he spends working for money; for him the goods and services produced within his household or by his family members are more important and include more of the necessities of life than the goods he buys or sells.²³⁹ A subsistence economy also has significant social and psychological effects. It is impossible to provide a margin of security for one's family—there is always the danger of a "hungry season" when the last season's crop has been eaten and the new crops have not yet come in.²⁴⁰ This in turn creates a fatalistic philosophy, since the individual does not believe that he can control the future or the conditions of his environment.²⁴¹ And to the extent that survival depends upon the joint efforts of a community, individual initiative and innovation are stifled.²⁴²

With the advent of modernization, a transition is occurring from a subsistence to a market economy, and in all probability most Africans are now aware of and influenced by the place of money in the economy.²⁴³ *The transition from subsistence to market agriculture is perhaps the single most important economic change taking place in Africa today,*²⁴⁴ and it will be important to consider whether the present system of land law has the force of accelerating or retarding this transition.

There are also various cultural obstacles impeding economic development in Africa.²⁴⁵ In the traditional society the possession of property itself would sometimes confer status without regard to whether the property had economic utility. In Ethiopia, for example, and I would imagine in a number of other countries, ownership of land is highly prized for its own sake, and disputes over valueless land are frequent.²⁴⁶ The "cattle culture" affects certain groups, partic-

238. *Id.* at 97-99.

239. *Id.* at 33.

240. *Id.* at 34.

241. See the discussion of this point in HUNTER, *THE NEW SOCIETIES OF TROPICAL AFRICA* 14 (1962).

242. KAMARCK, *supra* note 225, at 34.

243. *Id.* at 33-34.

244. KAMARCK, *id.* at 99-100, distinguishes four stages of the transition. The fourth and final stage, where production for the market predominates, is presently limited to cocoa farmers in Ghana and western Nigeria and the coffee producers of the Buganda region of Uganda. The transition also has significant implications for the domestic market. See the discussion in HANCE, *supra* note 222, at 21.

245. This is in addition to the formidable physical ones. For a discussion of the latter see HANCE, *supra* note 222, at 17-19.

246. It is estimated in Ethiopia that better than 50% of all litigation involves land. Moreover, a great deal of land owned by large landholders is often not utilized because (1) the retention of the land enhances the owner's status, and (2) the profits on the portion utilized supply him with sufficient cash.

ularly nomadic and semi-nomadic ones, and those where cattle is the basis of bridewealth. Livestock becomes degraded, and the emphasis is on number rather than quality. Grazing land is almost universally in poor condition.²⁴⁷ Another problem is the absence of any concept of positive value in work. Work is no more than a survival imperative in the subsistence economy. So too, the concept of "time-motion" is lacking. The important thing becomes the social enjoyment derived from performing a task rather than the rapidity or economy of effort.²⁴⁸ We have previously discussed some of the difficulties caused by the extended family system and its inhibiting effect on individual initiative. Likewise, traditional methods of farming may have a cultural (and perhaps a religious) significance, and a change in behavior patterns may be resisted.²⁴⁹ On the other hand, there is evidence to the contrary, evidence showing that the African is open to innovation, and that he will change his ways if sufficient incentive is provided and probability of success is demonstrated. In most African societies, the farmers are not deeply attached to a particular piece of land and will move as new land is available.²⁵⁰ On the whole, however, traditional behavior patterns and attitudes are an inhibitory factor. And, as we will see, the traditional systems of land tenure, as reflected in the customary law, are built around these behavior patterns and attitudes.

The above discussion is designed to demonstrate the difficulty and complexity of economic development in Africa today. This makes the role of law in promoting this development all the more significant. For, as we have pointed out at the beginning of this writing, it is the organs of government which will be directing the development. There is simply no time to wait for change to take place "through the unhurried dialectic of the market."²⁵¹ An affirmative response of government is demanded, and development will take place according to a national plan.²⁵² Insofar as existing behavior patterns and methods of land utilization are inhibiting this development and preventing realization of the goals of the plan, the law may be called upon to bring about a change. In this context, law as a technique of social ordering may be indispensable to economic development. With this perspective it may be said that the most important body of law is that applicable to economic relationships, and in this area the law must provide affirmative direction.

247. HANCE, *supra* note 222, at 27.

248. KAMARCK, *supra* note 225, at 54, 101-02. The author points out that "this pattern often results in a decision not to put in more labor when that labor gives more income but at a sharply diminishing rate of return."

249. See the discussion in WARD, *supra* note 9, at 106.

250. KAMARCK, *supra* note 225, at 48-49, 101.

251. Seidman, *supra* note 212, at 1018.

252. See the discussion in FATOUROS, GOVERNMENT GUARANTEES TO PRIVATE INVESTORS 35 (1962).

B. *The Imperatives of Law Reform*

How does all of this relate to law reform? In the first place economic considerations must be given prominence in the establishment of the general body of law applicable to dispute resolution and problem adjustment. The substantive provisions must take account of the effect that a given rule of law may have on the creation of the conditions and the climate necessary for economic development. More importantly, a comprehensive and codified body of modern law affecting business and commercial relationships must be established. It will not be enough merely to apply the received English law; modern codes, reflecting African business and economic conditions, are a necessity. Here we are talking about sales law, insurance, bankruptcy, security transactions and so on. As Professor Seidman has pointed out, "The list of areas requiring modernization to create a suitable legal climate appropriate to modern systems of trade, industrialization, and finance could be multiplied almost endlessly."²⁵³ So too, is there a need to deal with labor problems and to provide for the regulation of businesses affected with the public interest.²⁵⁴ In all these areas the law must be modernized so as to be suitable for economic development in the modern world, codified to remove the inhibition caused by uncertainty, and adapted to the needs of the particular country, as it is engaged in the process of development.²⁵⁵

Since, as we have stated, the basis of economic development will be agriculture, it follows that the most important aspect of law reform will be that relating to the law governing land tenure and land utilization. This is all the more true, for, as will be seen, the present systems of land tenure and land utilization, *which are reinforced by existing law*, clearly have an inhibiting effect upon economic development. Not only will the law have to be employed to change patterns of behavior with respect to land holding and land use, but the law itself, in its present state, perpetuates and perhaps causes undesirable economic practices. It is important to distinguish reform of land law from what is popularly called "land reform." Land reform generally concerns the redistribution of land and "the breaking up of the large estates of the few to satisfy the land hunger of the many." It involves the transfer of possession and ownership of land to those individuals and groups who did not hold land under the existing political and economic system. The concern is with a more equitable distribution of the wealth represented by land. Of course, as land reform takes place, land law will likewise have to be changed, particularly where land reform changes existing relationships, *e.g.*, where the person working the land is given owner-

253. Seidman, *supra* note 212, at 1029.

254. *Id.* at 1054-55.

255. See the discussion, *id.* at 1028-32.

ship. The reform of land law, as we are using the term, refers to changes in the existing law relating to the *method* of landholding, that is, land tenure and land utilization, in order to change behavior patterns with respect to the land and to increase its economic productivity. Redistribution of wealth is not necessarily involved, and the emphasis is on the increased productivity and more effective utilization of *all* land. For example, if all the people have some land, but the land is being used for subsistence farming, there is no need to undertake land reform. But there is the need to change the patterns of behavior involved in subsistence farming and to channel the use of the land into the market economy. In this situation the question is whether the law may be employed to bring about a change in those behavior patterns resulting in the present method of land use. To the extent that the existing law relating to land does not achieve this objective, that law must be reformed. Perhaps the above distinction is not fully satisfactory, but it will serve to define what we mean by reform of land law: the change in existing law to eliminate problems in land utilization that may be caused by that law and the use of the new law as means of changing behavior patterns so that productivity and land utilization may be improved.²⁵⁶

The present system of land law in these countries follows the general pattern of the pluralistic order, with the received English law governing land relationships for a small number of people, while the major part of land occupied by Africans is held under the various regimes of customary law.²⁵⁷ This means that the law applicable to land tenure and land utilization in most cases is the law which reflects the behavior patterns and attitudes toward land that exist in the traditional society. The nature of that law is not such as to alter behavior patterns and attitudes, but by definition, the law develops in response to those patterns and attitudes. Insofar then as the present *methods* of land tenure and land utilization are impeding economic development, it follows that retention of the existing land law necessarily will have the same effect. If the law is to deal with the problems of agricultural development in any meaningful way, reform of the existing land law becomes imperative. However, to apply the received English law as such to the problems of land tenure and utilization would not appear to be a sound solution, since that law was not developed with reference to African needs or to the

256. The distinction comes out very clearly in Ethiopia. The provisions of the Civil Code dealing with property create a uniform law, designed to eliminate many of the traditional practices interfering with efficient land utilization. However, the code did not attempt to achieve a redistribution of land nor to significantly affect the relationships between large landowners and sharecroppers that prevail in many parts of the country. Until the latter situation is drastically changed, agricultural development will be restricted.

257. TWINING, *THE PLACE OF CUSTOMARY LAW IN THE NATIONAL LEGAL SYSTEMS OF EAST AFRICA* 18-19. See also Park, *A Dual System of Land Tenure: The Experience of Southern Nigeria*, 9 J. AFR. L. 1 (1965).

objectives of African economic development. What is needed is a new and uniform law, designed to deal with the problems created by the present system of land tenure and land utilization, and to change present behavior patterns and attitudes toward land. Only by such direct action can the agricultural economy ultimately be transformed from its present, largely subsistence state, to one producing for the market, and providing the basis for further economic development. In this area law reform is clearly indispensable to economic progress.

We may first look at the existing patterns of land tenure and land utilization, which are reflected in the customary law, and, therefore, are reinforced by the fact that most land is held under customary law. Although there are differences in the various land-tenure systems, all are founded on the principle of communal or tribal tenure and are based on the assumptions that 1) land has no scarcity value and 2) the right to use it depends on membership in or consent of the community as a whole.²⁵⁸ The African's traditional conception of land ownership is reflected in the classical statement of a Nigerian chief to the West African Lands Committee in 1912: "I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn."²⁵⁹ This type of tenure is perfectly suitable for a relatively small population, practicing shifting cultivation, and living in the subsistence economy, since there is no question of scarcity nor permanency, and little is expected from the land.²⁶⁰ The essential elements of the system have been described as follows:

The land law of the tribes, in all their infinite varieties, accommodates itself to the twin facts of a relative abundance of vacant land and plots brought to fruition by the efforts of individual families. In the more centralized states, allodial ownership is in the larger community—the stool in West Africa, the chief or other rulers in East Africa. In less centralized societies, allodial ownership is frequently in some smaller group—a village, lineage or family. However, the nominal "owner" must allocate portions of unoccupied land either directly to individual members of the relevant group or to subgroups, who in turn must allocate on demand to their individual members, as for example, among the Lozi or the Ashanti. In most systems, the right to exclusive possession of the plot in the individual or family to whom it has been allotted cannot be tampered with by the allotting authority (save in very exceptional circumstances) so long as it is being used. Upon its being abandoned to the bush, however, the former occupier has no further rights in the land, and it reverts to the control of the allotting authority.²⁶¹

258. KAMARCK, *supra* note 225, at 106. See also MEEK, *LAND LAW AND CUSTOM IN THE COLONIES* 7 (2d ed., 1949).

259. Quoted in ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 162 (1956). The author also observes that "[T]he universality of this concept throughout both Sudanese and Bantu Africa has been confirmed again and again wherever indigenous societies have been studied."

260. See MEEK, *supra* note 258, at 3-4, for a discussion of the relationship between land tenure and methods of cultivation.

261. Seidman, *supra* note 212, at 1005-06.

Land is generally classified into that which belongs to the whole community such as sacred plots or wood forests, private land which has been allotted to individuals or groups, often passing to their heirs, and unallotted land, which is vacant at a particular time. The area covered by the latter category contracts whenever a new allocation is made by the allotting authority and expands when cultivation is abandoned by the individual or group to which it has been allotted.²⁶² The classification is significant for internal purposes only. The totality of the land is often clothed with religious significance, and any transfer of family land to an outsider would traditionally have been considered an outrage likely to bring about serious misfortune.²⁶³

The system, it must be remembered, was founded on the assumption of land scarcity and the working of the land by shifting cultivation. As population increases and threatens to outgrow available land—and, in any event, if land yield is to be improved—shifting cultivation must give way to rotational farming.²⁶⁴ The assumptions on which the system was founded (at least the economic ones) are inconsistent with the establishment of permanent farms. Economists believe that if land is to be used for any purpose other than subsistence, it is necessary to give the individual farmer permanent rights to the land he is cultivating. If the incentive theory has any validity, it is clear that the farmer will need a great deal of incentive to undertake permanent cultivation. He must invest labor and perhaps capital to build up the quality of the soil, to improve the drainage by digging ditches or changing the slope, and protect the crops and stop wind erosion by planting trees or building fences. If the farmer is to make such an investment, he must feel that he has security of tenure for himself and for future generations. And if he is to borrow capital, the best security is the land itself, so that he must be given the power to encumber it.²⁶⁵

If agriculture is to be organized on a commercial basis, that is, if the subsistence economy is to be converted into a market one, permanent cultivation must be undertaken. Today, cash crops are becoming more and more prevalent, and coupled with population growth, are giving increased economic value to rights in land.²⁶⁶ It is these cash crops on which the future of agricultural development

262. See the discussion in MUGERWA, *EAST AFRICAN LAW TODAY* 101, 104-05 (1966).

263. COKER, *FAMILY PROPERTY AMONG THE YORUBAS* (1966). See also Asante, *Interests in Land in the Customary Law in Ghana—A New Appraisal*, 74 *YALE L.J.* 848, 852 (1965). However, this religious significance did not prevent the stools from granting long-term concessions to mining concerns. The mining concerns, while recognizing the allodial title of the stool, dealt with the land as if they were absolute owners. Asante, *supra* at 860-62.

264. See the discussion in MEEK, *supra* note 258, at 2.

265. KAMARCK, *supra* note 225, at 106-07.

266. *Id.* at 107-08.

depends. And yet the law governing most of the land held in Africa is based on a system that arose at a time when land did not have scarcity value and was being cultivated on the subsistence principle. Perhaps in some places the substance of the customary law has been altered to take account of changing economic conditions.²⁶⁷ However, this has not been true as a general proposition, and as a member of a Royal Commission investigating land conditions in Kenya stated:

It is clear that the root cause of the economic backwardness of various African territories, as well as of the native areas in the Union [of South Africa] lies in the failure to modify customary control of land occupation and tenure, which has prevented the emergence of land use and ownership compatible with modern forms of commercialized production in a money economy. The failure to make of the land a viable economic factor of production has condemned the peoples on it to eke out a precarious subsistence.²⁶⁸

It can be contended that the very theory on which customary land tenure is founded is inconsistent with the goals of economic development, which, in itself, would justify significant reform.

There are a number of specific areas in which the detrimental effects of the traditional system of land tenure and utilization, and the customary law which has developed from it, are evident. Customary law necessarily inhibits certainty of title, since the rules are unwritten and, therefore, subject to misinterpretation and dispute, which in turn gives rise to frequent litigation. Boundaries are equally imprecise and may depend on the memory of neighbors for their effectiveness.²⁶⁹ Insecurity of title further reduces the incentive of the occupier to permanently cultivate the land, and to the extent that the land is alienable, inhibits its purchase. Also, customary law does not recognize prescription. While an individual may lose his right to occupation by non-use, the family title is indefeasible and there is always a right of reverter in the family as the land-owning unit.²⁷⁰ This impairs the use of land as collateral security, since land pledged to strangers is, under customary law,²⁷¹ recoverable by the original pledgor and his successors from the original pledgee or his successors without limitation.²⁷²

Since the land belongs to the communal group, alienation by the individual occupier is theoretically and legally impossible. Al-

267. *Id.* at 109. The most comprehensive investigation of this phenomenon is Asante, *supra* note 263.

268. FRANKEL, *THE TYRANNY OF ECONOMIC PATERNALISM IN AFRICA* (1960), quoted in KAMARCK, *supra* note 225, at 108.

269. Seidman, *supra* note 212, at 1046.

270. See the discussion in ELIAS, *supra* note 259, at 166. See also COKER, *supra* note 263, at 62-63.

271. It may be queried if customary law would govern such a transaction in all cases. Suppose the lender were a commercial institution. Might not the courts find an "intention to be bound by English law?"

272. ELIAS, *supra* note 259, at 167-68. The author points out, however, that customary law does recognize abandonment and that adverse possession is strong presumptive evidence of abandonment.

though it can be alienated by the communal group,²⁷³ internal rules of customary law requiring consent of the different sub-groups may present problems.²⁷⁴ Commercial agricultural enterprises and industry seeking plant sites do not as a result have easy accessibility to land, so long as most land is held communally.²⁷⁵ Moreover, the occupier is unlikely to invest in land that he cannot alienate, since he may be unable to realize his investment if he must move.²⁷⁶

Since land is held communally, in the course of time holdings are likely to become fragmented. Population pressures may have reduced the amount of land available for farming so that shifting cultivation becomes less feasible.²⁷⁷ Small plots of land, to be permanently cultivated by a nuclear family or sub-group, become the rule. As that family or sub-group increases, less land must support more people, until a condition of subsistence is reached. This is compounded by the customary rules governing succession, which recognize the right of each family member to a share of the land, and with each generation the plots become smaller and smaller.²⁷⁸ From the standpoint of the economic productivity of land, it would be desirable if some members of the family were disinherited and forced to leave the land. Admittedly this would present additional problems, but so long as everyone can claim a piece of family land, no matter how small, there is less incentive to learn other "marketable skills." The present system of land tenure thus operates to bind people even more firmly to the traditional society.

There can be no doubt that the present system of land tenure and methods of utilization have an inhibiting effect upon economic development. Notwithstanding, they are given legal sanction insofar as matters relating to land are governed by customary law. If these patterns of tenure and utilization are to be altered, drastic law reform, so to speak, is necessary. A discussion of all the problems to be dealt with and alternative methods of solution is beyond the scope of this paper, and indeed, the author's competence. However, in the remaining pages I propose to discuss some of the reforms that have been undertaken in various places and to indicate at least the structural basis of land law reform.

The nature and direction of the reform will depend on the government's economic policy and its view on how the economy can be most effectively developed. If it is envisaged that the private

273. Seidman, *supra* note 212, at 1047; OBI, MODERN FAMILY LAW IN SOUTHERN NIGERIA 83 (1966).

274. OBI, *supra* note 273, at 84. He points out, however, that even if such consents are not obtained, the sale is voidable rather than void.

275. KAMARCK, *supra* note 225, at 164. See also the discussion in Williams, *supra* note 139, at 80-81.

276. Mr. Asante is of the view that in Ghana the possessor could alienate the land freely to another member of the stool. Asante, *supra* note 263, at 873.

277. See the discussion in Seidman, *supra* note 212, at 1048.

278. *Id.* at 1048-49.

sector shall have the primary responsibility, that is, that development will take place by the infusion of private capital and individual entrepreneurship, the principal demands of reform would seem to be clarity of title, alienability and relief from fragmentation.²⁷⁹ The community as a legal entity would cease to be the allocator and "owner" of land, and ownership, including the power to alienate, would be vested in individuals or at least nuclear families. Succession law would be directed toward preventing fragmentation and excessive tying up of the land. The system of registration, which heretofore has generally been limited to European-held and urban land,²⁸⁰ would be extended to all land as rapidly as possible.²⁸¹ In short, the modern land law would be based on the received English law, but adapted to the particular problems of the African state and hopefully without the artificial doctrines that have been encrusted into the English law of real property.²⁸²

But agricultural development need not follow this path. The collective principle of customary law can be retained so as to promote the establishment of cooperative ventures.²⁸³ Or, the government may decide to expand on the collective principle by undertaking large-scale resettlement on state-operated farms. If it adopts the latter approach, it may look to the land laws of socialist countries for its model. Another approach might favor a mixed system with private, cooperative and state holdings. The decision as to the kind of agricultural development will be one based on economic, social and perhaps political considerations. Once that decision is made, a new body of law must be fashioned to provide the means of implementation. In the clearest form, law then serves as a technique of social ordering. Its sanctions²⁸⁴ are employed to alter patterns of behavior so as to achieve the objectives of the society, objectives that, as we pointed out earlier, are based on the value system of the indigenous elite who now hold the reins of power. But it is only by this kind of radical reform of existing land law that sound economic planning and development can take place.

This kind of overall reform has not yet been achieved. However, a number of specific reforms have been made in an effort to bring methods of land tenure and utilization into line with the needs of economic development. Various land registration acts have been enacted for the purposes of providing some security of title, but as a practical matter they are difficult to enforce.²⁸⁵ Efforts have also

279. *Id.* at 1049.

280. *Id.* at 1047, n.186.

281. *Id.* at 1046-47.

282. And from which American courts are only beginning to extricate themselves.

283. See the discussion in Seidman, *supra* note 212, at 1049-59.

284. See HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 344 (1966).

285. See the discussion in Williams, *supra* note 139, at 80-81; Park, *supra* note 257, at 18-19; MUGERWA, *supra* note 262, at 106, 112.

been made to remove impediments to the establishment of freehold tenure. In Kenya the government has issued freehold titles to some land which was originally held under customary tenure, and in resettlement areas where Africans were acquiring former European farms, the new settlers were given freehold tenure.²⁸⁶ In former French Africa it is legally possible for all Africans to shift to freehold tenure. A 1955 colonial law provided for the confirmation of customary rights in land and the transformation of these rights to freehold tenure. However, the process has not gone very far except in the most economically advanced countries such as the Ivory Coast and Senegal.²⁸⁷ It should also be noted that in countries such as Ghana the substance of customary law itself has been altered in light of changing economic conditions, so that the occupier enjoyed most of the incidents of freehold tenure.²⁸⁸ In terms of resistance to change, this should demonstrate that the principle of communal control of land as against the right of the individual member is not deep-rooted. The advantages of individual ownership are well-understood, and such a change would be readily accepted by the occupiers,²⁸⁹ though perhaps not by the traditional authorities, whose power may thereby be eroded.²⁹⁰

This latter aspect has been very significant in Ghana. The relationship of land tenure to political control has long been recognized, and during the colonial period the policy of indirect rule dictated confirmation of the chief's power over communal land, although some restrictions (in furtherance of the objectives of the colonial government) were imposed.²⁹¹ With the advent of independence and the desire of the central government to break the power of the traditional authorities, legislation giving the central government effective control over stool lands was enacted.²⁹² Stool lands cannot be alienated without government approval, which serves to protect the tenure of the individual occupier.²⁹³ The government may also impose a trust over stool land and administer it for the benefit of the family members.²⁹⁴ The effect of this legislation is to treat stool lands as national assets so that there are two dimensions to interests in land:

286. KAMARCK, *supra* note 225, at 108-09. The view has been expressed that it is "inconceivable" in Kenya that all freehold title could be vested in the state (as in Tanzania, *infra*). The tendency in Kenya is said to be to "entrench individual land rights." MUGERWA, *supra* note 262, at 113. Compare the views expressed in Munro, *Land Law in Kenya*, 1966 Wis. L. Rev. 1071. For a discussion of the resettlement of a particular group see Homan, *Land Consolidation and Redistribution of Population in the Imenti Sub-Tribe of the Meru (Kenya)*, AFRICAN AGRARIAN SYSTEMS 224 (Biebuyck ed., 1963).

287. KAMARCK, *supra* note 225, at 109.

288. Asante, *supra* note 263.

289. See the discussion in Munro, *supra* note 286, at 1085.

290. See the discussion in MEEK, *supra* note 258, at 10.

291. See the discussion in HARVEY, *supra* note 284, at 107-08.

292. *Id.* at 113-22.

293. Asante, *supra* note 263, at 882-83.

294. *Id.* at 883-84.

that of the government and that of individual occupier.²⁹⁵ In terms of use of the land, the system is that of freehold tenure, but—in a clear historical analogy to early feudal times—the government has paramount title. Thus far, individual development is the rule, but the opportunity for government control of land utilization and the establishment of cooperatives or state farms is clear.²⁹⁶

This raises the question of direct governmental control over land utilization. If the agricultural economy is to be properly developed, modern methods of cultivation must be employed, and capital infusions into the agricultural sector will be necessary. The dilemma is, as stated by one writer:

No agricultural advance is possible with only a hoe and four acres; but neither will the provision of forty or four hundred acres per farmer be of any use unless capital and knowledge, for example, expensive mechanical techniques, are available to develop them. In modern conditions, and in almost all countries, these are coming more and more from Government departments and public agencies. But if public capital is involved the greater will be the degree of control and the greater the curtailment of private rights.²⁹⁷

Government control over land utilization in an African society would not be a radical departure from existing norms nor inconsistent with traditional values. What is transformed is the agency of control, which is now the government rather than the communal head. Such a transformation may be an integral part of the ideology of African socialism, which is based on the traditional values of communalism except that direction is now to be given by the government.²⁹⁸ As has been stated, "The African socialist idea is that traditional farms can be transmuted readily and directly into large-scale, technologically advanced farms if the government supplies managerial direction and mechanized equipment."²⁹⁹ Whether this will take the form of state farms, or as is more likely, government-sponsored cooperatives, will depend upon political and practical considerations. The advantages of cooperation among farmers are readily understood and meet with the value acceptances of the traditional society.³⁰⁰ All of this leads in the direction of government control over land allocation and utilization.

Tanzania has gone the furthest in this direction. The Freehold Titles (Conversion and Government Leases) Act of 1963 vests all land in the President of the Republic and abolishes freehold tenure. Land

295. *Id.* at 884-85.

296. See the discussion in Munro, *supra* note 286, at 1088.

297. Baldwin, *Land Tenure Problems in Relation to Agricultural Development in the Northern Region of Nigeria*, AFRICAN AGRARIAN SYSTEMS 65, 77 (Biebuyck ed., 1963).

298. See REPUBLIC OF KENYA, AFRICAN SOCIALISM AND ITS APPLICATION TO PLANNING IN KENYA (Gov't Printer, Kenya, 1965).

299. Drew, *How Socialist Are African Economies?*, AFRICA REPORT 13 (May, 1963).

300. See the discussion in Seidman, *supra* note 212, at 1049-50.

is now to be held under government leasehold with a maximum duration of 99 years. However, this legislation did not abolish customary tenures nor change the substance of the law governing rights in land, i.e., land held by people living in rural areas in the traditional way will be subject to the principles of customary law while estates and urban land will be governed by English law.³⁰¹ The change was in the power to control the development of land, which is now vested in the government instead of tribal authorities or freehold owners. At present, most of the country is still in the shifting cultivation stage, with agriculture being mainly subsistence and the population almost static. As this changes, a reform of the substantive law applicable to land rights will be necessary,³⁰² and the principle has already been established that the government will control land allocation and utilization.³⁰³ The rights of a person in land will arise out of his status as a member of the society rather than on his ability to obtain land by contract, and in this sense land tenure will accord with the values of the traditional society.

In all sub-Saharan African states methods of land tenure and utilization must be changed if economic development is to take place. This will require a fundamental reform of the present land law, which reinforces the status quo. However, the direction of legal change cannot be determined without a basic normative decision.³⁰⁴ If the development of the economy is to be accomplished primarily through the private sector, the institution of individual ownership must become firmly established. This would require the abandonment of customary law, which is based on communal tenure, and its replacement by a body of modern and uniform law, structured upon the received law perhaps, but also adapted to the problems and needs of the African country. On the other hand, it is equally possible—and perhaps more in accord with traditional values—to accomplish agricultural development through the public sector. If this approach is taken, land control will be vested in the government, and individual rights of utilization will be subordinate to the plan of development. A mixed approach is also possible. At one point or another the “basic normative decision” will have to be made, and whatever direction is taken, fundamental reform in the existing land law will follow.

301. See the discussion in MUGERWA, *supra* note 262, at 110-111.

302. *Id.* at 1011.

303. “The Government considers that the urgent need for raising the standard of living of the people of Tanganyika and the vital importance of agriculture in the country’s economy compel it to use its power to procure development of land.” GOVERNMENT OF TANGANYIKA, PROPOSALS FOR LAND REFORM, at 10 (1962).

304. Seidman, *supra* note 212, at 1051.

CONCLUSION

Law reform is generally viewed in the perspective of the response of law to social change. It is equally vital to consider the role of law as an instrument to achieve social change. In the emerging nations of sub-Saharan Africa both dimensions of law reform are graphically presented. Nowhere else can the process of law reform be analyzed so fruitfully, and perhaps nowhere else is law reform so crucial at this time. For here law reform will be an integral part of revolutionary and fundamental social change. The ability of the law, on the one hand, to accommodate itself to social change, and on the other, to accelerate such change, will be put to the test. The future of these nations may depend on how well the challenge is met.